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IN
CALIFORNIA.

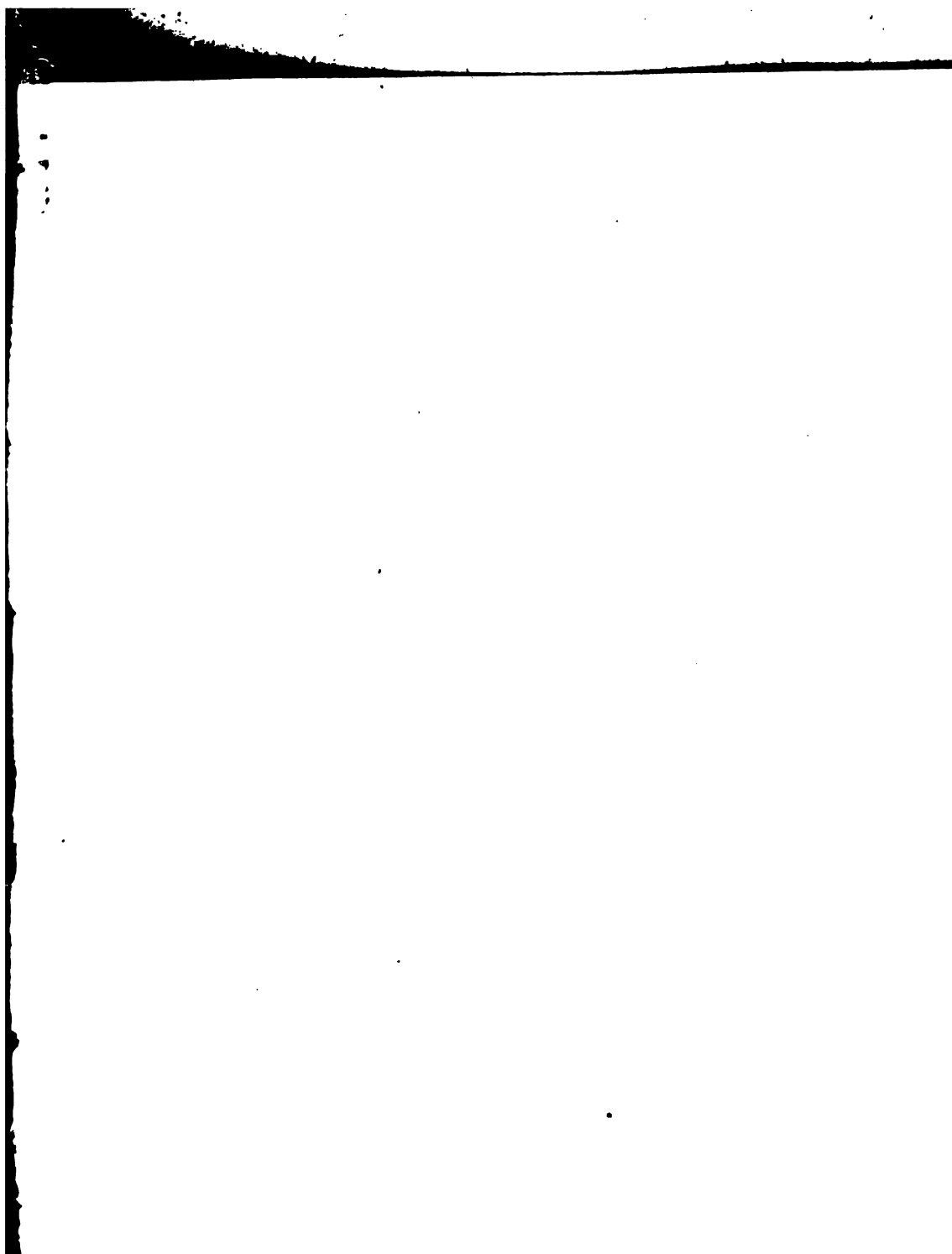


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1

BENCH AND BAR

—(IN)—

CALIFORNIA.

HISTORY, ANECDOTES, REMINISCENCES.

BY

OSCAR T. SHUCK,

(*"Scintilla Juris."*)

OF THE SAN FRANCISCO BAR.

SAN FRANCISCO, CAL.

THE OCCIDENT PRINTING HOUSE, 429 MONTGOMERY ST., SAN FRANCISCO.

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TO THE

HON. S. C. HASTINGS,

Whom I have known the longest of them all—Chief Justice of our Supreme Court in 1850, and still exhibiting a sturdy manhood in 1887—I would regardfully inscribe this volume: counting it a happy circumstance that I may associate the only Chronicle of our BENCH AND BAR with the name of the honored founder of our only College of Law.

THE AUTHOR.

PREFACE.

The omission of this page might be noticed, as being an innovation. I publish my book because the story of the California Bar has never been told. In a free State, the profession of the law is the highway of ambition—a broad avenue, whence open fields of splendid possibility. Bar leaders walk before the universal eye. In older lands, a copious literature has made them its subject. Here, too, are masters of the Forum, to whom, with others gone before, many notable triumphs are to be credited. The meteoric McDougall, the eccentric Lockwood, the eloquent Hawks, the brilliant Byrne; Baker with a voice like Israfel; Randolph and Baldwin, noble remembrancers of the land and fame of Marshall; Felton and Murray, cut off in their manly pride and prime;—all have passed to their ultimate appeal. But their peers survive, and it is given me to tell the stirring story of the living and the dead.

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"Baker, you know *everything*—except law."

It was the elder Baldwin who spoke, a master mind in legal science. It was in the long ago, and he was rallying no less a man than Edward D. Baker, even then famed at the bar and in arms. Baker had held a brilliant place at the bar of Illinois, among those to whom he afterwards pointed (with a modesty that excluded himself) as "the pride and boast of the Mississippi Valley." He had won distinction in Congress, and as a soldier in the war with Mexico. Now, early in the "Fifties," having established himself in law practice in San Francisco he had gone to Sacramento, the capitol, on a professional visit. It was his first appearance in the interior of the State. While happiest in criminal cases, he was now enlisted in a civil trial. The plaintiff was the well-known lawyer, Joseph W. Winans, suing Hardenberg & Henarie, of the Orleans Hotel, to recover \$3,000 on a promissory note given for legal services. The defense was made by only one of the partners, who said the note was executed by the other after the partnership was dissolved. But the other partner testified to the contrary.

Baker was for the defense. He made a splendid effort to uphold a lost cause. In spite of the evidence he at least upheld his own fame for ingenuity and eloquence. But the plaintiff obtained a verdict, and the judgment thereon was affirmed on appeal. The trial below was before Hon. A. C. Monson and a jury. George Cadwalader, who had just come to the bar, was the lawyer who had the honor of the triumph. It was on this occasion that Joseph G. Baldwin, who had witnessed Baker's felicitous performance, accosted him with the opening words of this chapter. And the witty Southron followed them with a specimen of that infectious laughter that was his alone.

There was no political campaign pending just then, but the Sacramentans were bound to hear Baker outside the court room. They called him out on the lecture platform. He gave them "Books." He was full of his theme, and Baldwin was perhaps the most appreciative and most charmed of all his auditors. But the next day the Virginian had another sally for the lecturer

on "Books." "Baker," he said slowly, "you know everything about books—except law books."

The "Old Gray Eagle," as we fondly called him, soared close to the sun. His soul fed on poetry and fame, he was brilliant in the nation's eye, and "the path of glory led him to the grave." He was not very long at this bar, but his career here was cast in a crucial and eventful period. His triumphs and defeats were notable, and his figure looms up as the most striking in our legal annals.

He was born in London, England, in 1811. When five years old his parents came to the United States, bringing him with them. They came to this country, loving its institutions. They were teachers, educators, and making their home in Philadelphia when the echoes of the old bell of freedom yet lingered on the air, they opened a school and taught the youth of that city until the father's death, ten years later. The mother lived to a great age, surviving her distinguished son.

When in the fullness of time, the latter became a United States Senator, his first letter bearing the Senatorial frank was addressed to the aged mother. The Rev. Thomas H. Pearne, of Portland, Oregon, is authority for the statement that, on the way to the Post Office with the letter in hand, and conversing with a friend, the Senator remarked with fond pride that his mother, then more than eighty years old, was a woman of strong, cultivated mind; that she had often taken down his speeches in short-hand, which she wrote with elegance and rapidity; that she was a beautiful writer and still retained in vigor her mental faculties. Tears were in his eyes as he recounted her virtues and excellences.

At seventeen Baker went to Illinois, settling at Carrollton. He studied law and elocution. When he was twenty-one he entered the Black Hawk war, obtaining a Major's commission. He distinguished himself in that war. In 1845-6 he represented the Springfield district in Congress; and the old *Globe* will show that he was then gifted with that clearness of vision, and that charm of speech, which later so often fascinated the people of the New West. He was then the first orator of Illinois. He was a Whig, but, unlike most of the Northern Whigs, he favored the Mexican war. He gave up his seat in Congress to fight under Taylor. He was at Cerro Gordo, at the head of the Fourth Illinois Regiment, which regiment was raised by him. Without following him through the war, let it be said that at its close his State presented him with a sword.

In 1849 he went to Congress again—a Whig from a Democratic district. Governor Stanly, in his oration at Baker's funeral, said: "He had, if not all the ambition, the courage and genius of Julius Cæsar." Governor Stanly might have said he had, too, the ambition of Cæsar. Baker was among the most ambitious of men. He loved fame. His soul was ever athirst for glory.

I am tempted to believe that he favored the Mexican war, in opposition to his Whig friends, chiefly because it was *war*, and afforded him an opportunity to slake the burning thirst of his heart.

In 1851 we find Baker in a strange role—superintendent of construction of the Panama Railroad. He had a heavy force of men under him, and managed them with ability.

In June, 1852, Baker arrived in San Francisco, and until he departed for Oregon, eight years later, he practiced law here with distinguished brilliancy and success. In 1859 he ran for Congress on the Republican ticket. That was, without exception, the most interesting year in the political history of California. It was the year of Broderick's death—the year when the great Democratic party broke in two. Burch and Scott were the regular Buchanan administration candidates for Congress. The anti-Lecompton or Douglas candidates were Joseph C. McKibben of Sierra, and Judge Booker, of Stockton. The Republican candidates were Colonel Baker and P. H. Sibley. California then was strongly Democratic. By a tacit understanding between the Republicans and Douglas Democrats those two elements coalesced on candidates for Congress, and cast their united vote for Baker and McKibben. It was of no avail. Burch and Scott were elected by a heavy majority. But Baker made a magnificent canvass. From San Diego to Yreka his eloquent tongue was heard, and never before or since have our hills and plains echoed so marvelous a voice. The Sacramento *Union* employed short-hand reporters to accompany the orator, and to report his speeches verbatim. It was in that campaign that Baker made his great speech at Forest Hill, Placer County, known as his "Forest Hill" speech.

"I am here speaking in the mountains," were his opening words, "always in all lands favorable to the great idea of real liberty; always an inspiration to its defenders; always a fortress for its warriors." Henry Edgerton, himself an orator worthy of the name, who was with Baker at Forest Hill, declared he never heard so grand a speech. It may be found in full in the Sacramento *Union* of August 23, 1859.

It was in this campaign that I, a boyish worshiper of this magnetic orator, had the pleasure of grasping his warm hand for the first time? It was on the very day of election, and at the Third ward polls in Sacramento. The "Old Gray Eagle" had closed the fight by a magnificent speech in Sacramento the night before and was about to take the two o'clock P. M. boat for San Francisco, but visited in person the various polling places. Just as he was leaving the Third ward precinct he caught my eye and saw the tickets in my grasp. Lifting my hand with his he read the tickets which I held, and seeing thereon his own name, said: "The young and the old work together to-day."

Colonel Baker lost this fight. As he afterwards publicly declared, his

hopes and his heart were crushed. But in less than one year from the time of that Waterloo, he was a Senator of the United States! Oregon was his constituency. On the eve of his departure for Oregon, to capture a State of which he was not a resident, Governor Low bet him a suit of clothes that he would not succeed in getting to the United States Senate. When he came back triumphant, Governor Low was in the van of the great throng that welcomed him. "I'll take that suit of clothes, Low," was the first thing Baker said. He got the suit, but some people say that if he had lost the wager, his memory would not have proved so reliable.

While attention is turned to Oregon, I may tell this also, which I get from Mr. J. M. Verdenal. The latter, by the way, declares that Baker was the greatest orator he ever heard, and he has listened to Daniel S. Dickinson, Judah P. Benjamin, Robert G. Ingersoll, and other famous speakers. Mr. Verdenal's brother, D. F., now a leading newspaper correspondent in New York City, and who practiced law for a few years in San Francisco, pursued his legal studies in Baker's office. Being in Washington shortly after his old friend had become a member of the Federal Senate, he took occasion to pay his respects to "Baker of Oregon" in the senate chamber. "Young man," said the senator, grandly, "I hope that *you*, some day, may stand on this floor as a senator from a sovereign State." "Thank you," responded Verdenal, "I hope I will not have to emigrate to Oregon in order to get here."

Baker was very engaging on the lecture platform. Few, if any, of his efforts in that line, were reported with any attempt at fullness. Indeed, before 1859, short-hand was a very rare accomplishment in California. Notable among his lectures, besides that on "Books," were "The Sea," "The Plurality of Worlds" and "Socrates." These he treated with a glowing imagination, closing the last named with a noble tribute to TRUTH. At the Burns' Centennial, 1859, he was very happy.

Another fine effort was his oration at the dedication of Lone Mountain Cemetery (where his body rests), May 30, 1854. Starr King, in his touching address, six years later over Baker's open grave, made this allusion: "We have borne him now to the home of the dead, to the cemetery which, after fit services of prayer, he devoted *in a tender and thrilling speech*, to its hallowed purposes." Then Mr. King gave these lines from it: "Within these grounds public reverence and gratitude shall build the tombs of warriors and statesmen who have given all their lives and their best thoughts to their country."

Baker's most deliberate, thoughtful and polished production, was his oration at Broderick's funeral, September 18, 1859. It contains his stirring protest against dueling. Never was man so eloquently mourned as Broderick.

Baker worshipped the beautiful as ardently as Poe—the beautiful in art, in literature, in nature. His soul was full of poetry. One day, during the recess of a murder trial, in which he was about to speak for the prisoner, his

eye fell on one of those beautiful little fugitive poems that sometimes come and go, no one knows where. After reading it repeatedly and examining it thoughtfully, he showed it to a brother lawyer (the late Lewis Aldrich) saying: "Isn't that beautiful? I have been thinking how could I weave it into my speech this afternoon. I don't know where I can bring it in, but I'll find a place for it, if I hang my man."

Baker was counsel for the defence in the Snyder embezzlement case. Major J. R. Snyder came to California from Pennsylvania, his native State, several years before the Argonauts. He was in the first Constitutional Convention (1849) from the Sacramento district and in 1852-53 was a State Senator from San Francisco. He died on his Sonoma farm about 1877, leaving a valuable estate, including business property in San Francisco. While he was superintendent of the San Francisco Mint, he was tried in the Court of Sessions (T. W. Freelon, Presiding Judge), A. D. 1853, on a charge of embezzlement—it being asserted that there was a continuous shrinkage in the precious metals brought to the Mint. The defense claimed that the missing gold had gone, not where the woodbine twineth, not exactly up the spout, but—up the chimney, and had been wafted off in those golden clouds that are wont to circle above all mints, where they

"Become enthroned in upper air
And turn to sunbright glories there."

During the progress of the trial, the Mint whistle blew one day at twelve o'clock noon. "What is that?" said one lawyer to another. "It is Uncle Sam whistling for his money," was the reply.

Judge Freelon remarked to me that Baker's argument on that trial was the finest he ever heard him deliver. Baker had a faculty of understanding mechanical principles. Major Snyder did not; nor did more than a few of the witnesses. Baker must have spent several weeks in studying in detail the chemical operations of the Mint, for on the trial he showed that he knew more on this subject than anybody else. In his argument he turned his knowledge to good account, and also displayed his best powers of oratory and illustration. He acquitted his client, who was generally believed to be an honest man, but an incompetent manager. Judge Freelon also heard Baker in the Cora case; and thought while his speech in that case was more brilliant and eloquent and impassioned, yet, as a forensic effort, an argumentative display, a union of fact, argument and expression, the speech in behalf of Major Snyder was more creditable to him as a lawyer and advocate. Mention of the Cora case recalls the fact that Baker suffered a severe penalty for his brilliant defense in that celebrated trial. For a time he was socially ostracized. Society indicted him. It would never have visited such censure upon an advocate of ordinary powers. Cora had killed General Richardson, United States

Marshal, and his trial for the crime commenced January 8, 1856. He employed Colonel Baker to defend him, but public opinion insisted that the Colonel should leave the accused to his fate. He did his duty, and, in consequence, such was the inflamed state of the public mind, the eloquent old man suddenly found himself like a stranger in a strange land. Day after day the newspapers poured out their wrath upon his head. He stood his ground and "hung the jury." Before Cora could be put on trial the second time the Vigilance Committee hanged him. I will not say anything of that great popular uprising; I only touch the Cora trial because it concerns Baker's fame. It is hardly necessary, now, to argue that Baker had a clear right to defend the prisoner. The public opinion, which would tell a lawyer whom he may and whom he may not defend, would, if permitted, dictate the judgments of courts of justice.

But Baker may be quoted in his own vindication. In his defense of Cora before the jury he took occasion to say:

"The legal profession is, above all others, fearless of public opinion, candid and sympathetic. It has ever stood up against the tyranny of monarchs on the one hand, and the tyranny of public opinion on the other. And if, as the humblest among them, it becomes me to instance myself, I may say it with a bold heart—and I do say it with a bold heart—that there is not in all this world a wretch so humble, so guilty, so despairing, so torn with avenging furies, so pursued by the vengeance of the law, so hunted to cities of refuge, so fearful of life, so afraid of death—there is no wretch so deeply steeped in all the agonies of vice and misery and crime—that I would not have a heart to listen to his cry, and find a tongue to speak in his defense, though around his head all the fury of public opinion should gather, and rage, and roar, and roll, as the ocean rolls around the rock. And if I ever forget, if I ever deny, that highest duty of my profession, may God palsy this arm and hush this voice forever."

It is the judgment of many that Baker never stood forth as the orator so irresistibly as in the old American Theatre (where now stands the Halleck Block) on the night of October 27, 1860. Perhaps on that occasion he excited his audience to a pitch of enthusiasm and delight beyond all his other triumphs. One year before, he had left the State—defeated in a tremendous struggle, but hopeful and free of soul. He was now on his way from Oregon to Washington to take his seat as a Senator of the United States. He seemed inspired. The speech was fully reported and widely distributed. Delivered without notes, it was full of gems that will sparkle forever, as this:

"Here, then, long years ago, I took my stand by freedom, and where, in youth, my feet were planted, there my manhood and age shall march. And, for one, I am not ashamed of freedom. I know her power; I rejoice in her majesty; I walk beneath her banner; I glory in her strength. I have seen her struck down on a hundred chosen fields of battle. I have seen her friends fly from her. I have seen her foes gather around her. I have seen them bind her to the stake. I have seen them give her ashes to the winds, regathering them again that they might scatter them yet more widely. But when they turned to exult I have seen her again meet them, face to face, clad in complete steel, and brandishing in her strong right hand a flaming sword, red with insufferable light!"

The natural grace, the manly animation of the speaker, the way he suited the action to the word, were peculiarly his own and full of fascination. He appeared to brandish in his own "strong right hand," the "flaming sword red with insufferable light;" and his audience, tossed on the mountain waves of his eloquence, seemed to see him standing, unconquerable, the especial champion of Freedom, who, no more to be bound to the stake, was to exult in majesty and triumph forever. The daily papers, reporting the occasion, told of one individual in the audience, who, in the exuberance of his enthusiasm, leaped on the stage, and cheered as he waved the flag of freedom before the throng. This was no other than Bret Harte, then "a youth to fortune and to fame unknown."

During his short term in the Senate he delivered a few great speeches, in one of which occurred his oft-quoted tribute to the press. He also quickly won a high reputation for skill in debate, while his reply to Benjamin, in January, 1861, evidenced great logical power as well as majesty of expression.

It surprised the country when Baker left the Senate for the "tented field." It was thought an unnecessary sacrifice. But Baker was under an uncontrollable impulse. He once told Samuel B. Bell that eloquence was not his forte. Bell, in astonishment, said: "If you can beat yourself as an orator, in another direction, you are certainly an extraordinary man." "Well, think what you may," replied Baker, "my real forte is my power to command, rule and lead men. I feel that I can lead men anywhere." He raised a regiment, and went into this his third warfare as a Colonel. His career in the field was even shorter than his time in the Senate. He fell in his first fight, on the 21st day of October, 1861—gallantly, gloriously, and was commissioned Major-General after his death. Brilliant, restless and checkered life! These lines close a pathetic little poem, "To a Wave," written by him twelve years before his death:

"I, too, am a wave on a stormy sea;
I, too, am a wanderer, driven like thee;
I, too, am seeking a distant land,
To be lost and gone ere I reach the strand;
For the land I seek is a waveless shore,
And they who once reach it shall wander no more."

Baker's delivery was rapid, his voice melodious, his diction polished, his gesture free and full of grace. He had a splendid person, an eye full of fire, a noble forehead; and nose and mouth and chin were finely chiseled. His hair had long been very gray. On the platform his manner was marked by perpetual animation. He loved all arts, all sciences. His imagination was rich, his reading wide, his memory extraordinary. His countenance and bearing and his gray locks recalled the picture of Thorwaldsen, of whom it was said that when he moved in the midst of a crowd, it would separate as

if it felt the presence of a superior being. His disposition was the perfection of amiability. In his most heated forensic and political contests he was never betrayed into saying an unmanly thing of an adversary. He was a giant before a jury. So great were his gifts of oratory that his knowledge of law has been underestimated. But he was learned in the profession of his choice—a profession that opened so broad a field for the display of his varied powers.

Now and then, and here and there, has been heard the promise of a publication of Baker's Speeches, Lectures, etc., in book form. So engaging a volume may never appear. There has been issued, however, a "Sketch of the Life and Public Services of Edward D. Baker," by Joseph Wallace, (Springfield, Illinois, 1870). Those interested will find Baker's best political speeches in our libraries, in the files of the old Sacramento *Union* under dates of June 9-10; July 2-13-15; August 23-24; September 22-30—all in the year 1859; and October 26, and November 5, 1860. His "Atlantic Cable Oration," beautiful beyond eulogium, is the opening piece in my "California Scrap Book" (1869). His moving address at the burial of State Senator William I. Ferguson (who fell in a duel) September 16, 1858, his nobler "Broderick Oration," September 18, 1859, the imperishable words of Gen. James A. McDougall on the death of Baker, delivered in the United States Senate, Gov. Stanly's Oration at Baker's burial, and Thos. Starr King's brief but thoughtful address at the great man's newly opened grave, are all given in full in my "Representative Men of the Pacific" (1870). The address last referred to is a masterly assertion of the soul's immortal life. The declaration "Paul goes to an immense service still as an Apostle; Newton to reflect from grander heavens a vaster light," never fails to stir me when I see the preacher's marble tomb.

A broad street in San Francisco, not open at Baker's death but now lined with dwellings, bears his name. It will recall his fame when the cemetery where his mortality lies has long ceased to be the city of the dead and been added to the domain of throbbing life.

CHAPTER II.

Hall McAllister—The Veteran of the Bar—Scion of a Line of Lawyers—A Name Scattered Through Seventy Volumes of Reports—Personal Description—A Practice of Widest Range—Extraordinary Capacity for Work—Manner of Trying Cases—A Contrast with Edmund Randolph—Anecdotes—Judge Lake's Estimate of His "Muse"—Mr. Papy's Pleasantry.

Glance at the date on the title-page of this volume, and reflect that Hall McAllister has been in continuous practice at the San Francisco Bar since the year 1849! If there have been some in whose variable radiance his steady light has been dimmed now and then, he has illustrated the happily expressed truth that the prolonged sunshine is better than a flash of lightning.

Through all this stretch of years he has kept faith with his profession in all its branches. The tide of his practice has known no ebb since its first swell in the middle of the century, and it has had an exceptionally extended range. Moreover, his indefatigable industry in preparation, his serene patience in the elucidation of intricate facts, the remarkably thorough way in which he tries his whole case, and the freedom with which he is consulted by lawyers generally, are qualities and considerations that lift him to the distinction of *primus inter pares*.

Is he as old in years as all this implies? No. His step is light, his mind clear and strong as ever, and, besides doing a great deal of work at night, he is regularly in his office long before "office hours" open. He was born in 1826. A native of Georgia, of remote Scotch extraction, he comes of a line of American lawyers. His grandfather, Matthew McAllister, held under Washington the office of United States District Attorney for the southern district of Georgia. His father, Matthew Hall McAllister, held the same position by appointment of John Quincy Adams, and in 1855 became, by appointment of President Pierce, the first United States Circuit Judge of California.

Hall McAllister arrived in San Francisco in June, 1849, a year before his father came, and by way of the Straits of Magellan and Valparaiso. He took his place at this bar in August of that year, a novice among experienced men. He was a wary observer, in love with his calling, and entered the lists with that resolute purpose, which, if stubbornly adhered to, rarely fails to bring to the legal practitioner a fair measure of success.

That period of probation from which lawyers—even those of the brightest

parts and promise—seldom find exemption, was with Hall McAllister exceptionally brief. Several favorable circumstances conspired with his native bent and energy of character to cut his probation short, and to launch him auspiciously into the full tide of practice. Of an honorable and talented family, courted by society, enjoying the affectionate help of a father distinguished in his own profession, anxious and able to assist and advance him; of fine person, robust health, resolute purpose, vigorous mind and a fixed ambition, he stepped into the arena of professional life with the air of one who feels he has a hold upon the future, and with the almost absolute assurance of success. It is most true that he owed much to fortuitous circumstances; much to paternal promptings and guidance, "which nursed the tender thought to reason, and on reason build resolve—that column of true majesty in man;" but it is just as true that even without such aids he was born to be what he long ago became, one of the few unchallenged leaders of a large and able bar. He has never known what it is to be poor, or without friends, although he is nobody's hero, and has never wielded great wealth. But even if he had set forth upon his brilliant career without the advantages of competency, friendship and a liberal education, he would surely have arrived at the desired goal by slower marches but in good season. If we attribute his auspicious entry into professional life chiefly to good fortune, we must give him credit for the unsurpassed zeal and industry which have distinguished his progress. He might have builded on his father's fame, but instead thereof he laid his own foundations, and the superstructure which he has erected is entirely his own. He has a more vigorous and comprehensive legal mind than his father possessed.

The personal appearance of some men conveys a false idea of their ability and standing. Some really little fellows are unduly exalted in the mind of the stranger, by their Websterian heads, and countenances cast in the very mold of wisdom. Others, who possess abilities of the first order, attract attention only when deep emotion lights up their else expressionless faces, or when some great cause or occasion stirs their sluggish blood. But the features and presence of McAllister certainly deal honestly by the observer. His very build and bearing give to the beholder a correct suggestion of his capacity. The impression is not that of greatness or genius, but of strength. Whether we meet him in the street, in the court-room or in his office, we feel that we are in the presence of a strong man, to grapple with whom in his chosen calling must be serious business. We look upon him generally as a leader among men, and in the court-room, especially, we see in him the monarch of the local bar.

He has a large, square face, an unusual proportion of it below the eyes; a forehead neither full nor high, and lower than the average of men of ability, with no corrugations to betray the earnest study he concentrates upon his

causes; a head thick through and noticeable chiefly for its peculiar and irregular shape; the whole suggesting the seat of a practical mind, highly endowed with the powers of analysis and conclusion. His large and heavy frame lends to him the aspect of solidity and power, but his movements of body, notably lively for a man of his stature, militate somewhat against this impression. This alertness of movement corresponds with the action of his mind; and, like the latter, never runs into haste. Thoroughness and dispatch exercise joint and harmonious control over his whole being.

I have alluded to McAllister's custom of bringing out his case in all its strength and symmetry. In the trial of a cause his manner is, on the whole, admirable. He is cautious, but caution never fetters him. He is rapid, but is never carried beyond his object. Whether he goes over, around or through the chosen position of an adversary, he opens up a broad road, and leaves that position harmless behind him. One of his most noticeable habits is to take down with his own hand all the evidence of witnesses. He is eternally writing. St. Augustine said of that "most learned of the Romans," Marcus Terentius Varro, that he had read so much that we must feel astonished that he found time to write anything, and he wrote so much that we can scarcely believe that any one could find time to read all that he had composed. It may be said of McAllister, that he reads so much, it seems hardly possible he can write much; yet it would engross the time of almost any person to read, not what he composes, but what he writes down in court. What he writes would hardly prove as entertaining as the critical, philosophical and other treatises of Varro, for what drops from his pen is testimony. This, however interesting to him as bearing on his cause, would be dry, cold and barren enough to others.

This habit of taking down testimony, although the short-hand reporter is doing the same task more accurately, is very advantageous to an advocate. And it loses half its benefit when done by proxy, for the evidence is then the less impressed upon the advocate's mind. This duty is generally shirked, because it is hard work, and is unjustly regarded as merely manual. Successful lawyers usually turn aside from the clerical details of their business. In McAllister this habit of which we speak is in keeping with his unflagging industry.

The late Edmund Randolph was the opposite of McAllister in this as in some other respects. These two advocates, opposed in the trial of a cause, presented an interesting contrast. Randolph's wonderful memory was one of the most noticeable of his brilliant faculties. No matter how lengthy the trial, how numerous the witnesses, or how important the testimony, he disdained the use of notes, even though McAllister were opposed to him, urging his tireless pen through the whole trial.

When a motion was made in the Twelfth District Court to adjourn as a

mark of respect for Randolph's memory, the then Judge of that tribunal, called attention to this practice of the deceased, of trying his causes without taking notes, and urged the junior members of the bar to imitate the example as a means of strengthening the memory. It is to be hoped that this advice though given by a very excellent judge and lawyer, has not borne its legitimate fruit. Few men have remarkable memories; none have perfect memories. To strengthen the memory is commendable, and it is feasible, but to make it entirely reliable is hardly possible. Randolph could trust to this splendid faculty; but, generally, the advocate who imitates him will fall far short of his success. Whoso relies implicitly upon his memory is usually more showy than safe.

One of the best teachers in the public schools of this State, Andrew R. Jackson, then principal of the Sacramento High School, once told his scholars of a man who, many years previously, had been Clerk of the National House of Representatives, and who possessed a memory so extraordinary that he was able to write up accurately the minutes of the most busy and stormy session, without having taken notes. He did this day after day and week after week, until it was generally known how he got through with his work, when, although the fidelity of his journals could not be impeached, he was removed from his responsible trust. I am satisfied that my old preceptor believed this story, though he may never have investigated it more than I did. If it is true, the House of Representatives acted wisely in dismissing their brilliant and lazy servitor, because in his position he was unconsciously a dangerous man. McAllister has a good memory, but had he succeeded to that of Randolph he would yet adhere to his practice of taking copious notes. Without this practice he could try his causes well, but without it he does not seem to feel that he could try them thoroughly. This habit has so grown upon him that he sometimes goes through the motion of writing, even when listening intently to the court or opposing counsel.

In trying a jury cause, he sits usually facing the jury, and rarely rising from his chair. His table is covered with books and papers, and a boy is generally waiting to make fresh drafts upon his well-stocked library and his plethoric pigeon-holes. The court-room is for him a place of earnest work. He rests only when court takes a recess, and not often then. From the beginning to the end of the trial, he is writing, reading, questioning, objecting, arguing, appealing. The observer is constantly impressed with his industry and watchfulness.

In eliciting testimony, McAllister exhausts the information, without exhausting the patience of the witness. He never bores or insults. He never plays the tyrant over a timid witness, and never leads a rash one to his undoing, just for the love of the thing; never figures in any of the discreditable scenes in which lawyers and witnesses grapple in wordy combat.

McAllister, like every thoroughly trained lawyer, is politic, and therefore polite—alike courteous to court, counsel, jury and witness. To counsel associated with him in the trial of a cause he is uniformly deferential, but will not play second fiddle. He always leads his side. He is not troubled with the idea, which haunts so many legal small fry, that to be respectful to an adversary is to succumb to him, or that to listen decently to a postulate is to admit its soundness. He never sneers at a proposition, and never states one dogmatically. He meets the tyro with his hesitating step, and the veteran with his measured stride, with the same air of respect.

With all his dispatch, it is yet in the fullness of time, and, with a clear comprehension of his cause, that McAllister rises to address his familiar and favorite auditory—the jury. He is now in the house of his friends, and in speech and manner he shows that he is conscious of it. Having omitted nothing as regards introduction of evidence, so now he leaves nothing unsaid which the jury should hear. He speaks smoothly, exhaustively, yet avoids prolixity. The jury have witnessed his patient management, his shrewd generalship, the evidences of his careful preparation, and if, when he rises before them, they have not already recognized the fact that he knows his case to the utmost details, he soon convinces them of it. They appreciate his address to their reason, admire his methodical arrangement of facts, and find entertainment in his argument. Without betraying any effort to subject them to any personal influence; always respectful without being patronizing; ever earnest, but never inflamed; fluent, yet not verbose; easy in manner, yet a stranger to dramatic effect, he challenges respect for himself, even when he fails to elicit sympathy for his cause. His voice and physique, as well as the cast of his mind, are more suited to the argumentative than the pathetic style. At times, however, in capital cases, he approaches eloquence, drawing on the classics to give point and polish to his appeals. In quoting Shakespeare and the Bible he is quite happy. His elocutionary powers belong neither to the first nor the second order. Nothing can be said for his gesticulation; his metaphors are few and not striking, and, as to apostrophe, that perfect flower of Baker's oratory, he rarely calls it to his aid.

This Bar leader has no specialty. Great lawyers are often distinguished for specialties; too often the public assign them to specialties, when, in truth, they have none. McAllister has never suffered from this popular propensity. Not only has he no specialty, but the fact is acknowledged by all. Whether his case involves land titles, inheritance, patent right, private franchises, personal liberty, human life, or constitutional law, he is equal to the occasion. A prominent member of this bar—a former Judge of one of our District Courts*—once took occasion to bear public testimony to this fact.

*Address of E. D. Sawyer to the jury, in *Tyler vs. Holladay*, Twelfth District Court, April, 21, 1875. The parties to this suit were lawyers.

As a pleader—a writer of pleadings—our friend is careful and correct, evincing an intimate acquaintance with English forms and precedents. Although he probably does more work than any member of the California Bar, there is no one who takes things easier, or whom work hurts less. He owes this in a great measure to his powers of endurance—a splendid auxiliary to close mental application—and to his habit of investigating and methodizing at the same time. He is full of life and energy, has naturally a high temper, which he has under good control; seems to have schooled himself to be slow to anger; is not combative; has few intimates.

This advocate has one habit, which some commend and some condemn—that of interjecting into his arguments doggerel of his own manufacture. Perhaps it ought not to be condemned, because he generally turns it to account. It is at least better than punning, and an advocate perforce often indulges in pleasantry of some kind to cause a laugh and give surcease from the monotony of argument.

“A little nonsense now and then
Is relished by the wisest men.”

It may be said of McAllister's poetry, that it is more pleasing to the ear when spoken by its author in court than it would be to the eye if in print. At any rate I shall not print any of it. Occasionally he receives punishment for his temerity in this line—or rather in these lines. In his argument in the case of the Hibernia Savings and Loan Society vs. Mahoney et al., Fourth District Court, 1877, he let go some verses on which issue was joined by the opposing counsel, Judge Delos Lake. The latter, recalling the stereotyped expression “more truth than poetry,” declared that his adversary's verses contained “more poetry than truth,” and added that “that was not saying anything for the poetry.”

Among this advocate's minor resources is an unfailing vein of humor, not noteworthy for its richness, yet not to be omitted in this sketch. On one occasion he was called at the eleventh hour, into a case in which he had a colleague who was well prepared. While the latter was examining a witness, his memorandum of authorities fell under McAllister's eye, and was soon copied on a fresh sheet of paper, and, in a short time, a messenger laid the books on the table. The time for argument arriving, McAllister's colleague called on him to open, which he did by reading from his own books his associate's authorities. In closing, he said his associate would supplement what he had said by further argument. The “associate” arose, with serious front, and observed, poor man! that he had intended to address the court, but that Mr. McAllister had covered the ground so thoroughly that he deemed it unnecessary to add anything.

A certain lame lawyer had a certain lame client. The two resembled each other strongly in their awkward gait and clumsy locomotion. The

litigant, while looking for his attorney on the street one day, hobbled up to McAllister and asked: "Have you seen lawyer — going along this way?" "I never saw him go along any other way," was the reply.

Among the more important of the law causes in which McAllister has won renown worthy of special note was that of *Tompkins vs. Mahoney*, tried in San Francisco in the year 1865. The plaintiff, a lawyer, recovered judgment against the defendant for some \$30,000, including interest for legal services rendered during a period of several years. McAllister was his attorney, and his excellent address to the jury so pleased his client that the latter declared, in his enthusiasm, that he would have given one-half of the amount of the verdict for a verbatim copy of the speech. (The courts had no official stenographers at that time.)

Mr. McAllister married a lady of rare accomplishments, a daughter of the late Samuel Hermann, and has raised a large family. He owns a city residence, a beautiful summer home in Marin County, and is in comfortable circumstances. Reference to family recalls a scene which occurred in the early days in the United States Circuit Court, of which tribunal Hall's father was judge, Hall's brother was clerk, and Hall himself the chief practitioner. It happened one day, so goes the story, that as McAllister was presenting an *ex parte* motion, no one being in the court-room but the father and the two sons—judge, clerk and counselor—J. J. Papy, a well known attorney, now deceased, having business in the court, opened the court-room door, and, after a hasty glance, was about to withdraw, when the judge said: "Come in, Mr. Papy." The latter bowed his acknowledgments to the bench, and said: "Your honor will pardon me; I hate to intrude into a family meeting." The punctillious Mr. Papy then silently stole away, and the argument was resumed;

As I turn from this commanding figure, his "chariot rolls on fortune's wheel" as ever. Though his triumphs are many and enduring; his name scattered all over our seventy volumes of Supreme Court Reports, beginning with the case of *Payne vs. Pacific Mail Steamship Company* in volume I; he continues to work as might one who felt the sharp spur of want. Possessing a powerful constitution, mindful of the laws of health, and retaining all his first love for his profession, he is destined, in the ordinary course of nature, to hold his place at this bar for yet a considerable period. He is one of the men who labor through life. He will die in harness.

CHAPTER III.

John B. Felton—College Days—Early Partnership with Edward J. Pringle—Celebrated Cases—The Great Limantour Conspiracy—The Local Option Question—"Mortgage Tax"—The "City Slip" History—Felton's Enormous Fees—His Learning, Genial Nature and Sparkling Conversation—The Bulkhead Bill—Allusions to Professor C. C. Felton, Judge Lorenzo Sawyer, Judge T. W. Freelon, Levi Parsons, Gov. John G. Downey, and others.

John B. Felton's professional life began and ended in San Francisco. He was born in Saugus, Essex county, Massachusetts, in 1827, and died at his home in Oakland, May 2, 1877. His father was superintendent of an almshouse in Cambridge, and lived and died in very poor circumstances, leaving three sons, all of whom became men of mark. One was President of a railroad company in Pennsylvania. Another was the great scholar, lecturer and writer, C. C. Felton. The father managed to get this son into Harvard, and lived to see him attain great literary fame. C. C. Felton was connected with Harvard from the time she received him as a scholar until his death. After graduating he became successively a Latin tutor, a Greek tutor, Professor of Greek, Eliot Professor of Greek Literature, and President of the College. Dearly he loved "the bright clime of battle and of song" and was said to dwell in "the atmosphere of ancient thought." Some of the most instructive and entertaining pages of the New American Cyclopaedia are from his pen—the articles on Agassiz, Athens, Attica, Demosthenes, Euripides, Greece and Homer.

Professor Felton educated his brother, John B., who was many years his junior, and who upon graduating from Harvard in the class of 1847, obtained through the Professor's influence a position as Greek tutor. He had proved himself to be one of the best Greek scholars of his time. He did not long pursue this vocation, having determined to read law. Among his classmates at Harvard were E. R. Hoar and Horace Gray.

While at his law studies John B. Felton was sent by his brother, the Professor, to Paris, where he remained a year, studying the Civil Code, indulging in the amusements of the gay capital, and making himself thoroughly acquainted with the French language, which he ever after spoke with great ease and correctness. He also obtained a good knowledge of Spanish, having made up his mind to settle in San Francisco, and knowing this tongue would

be of service to him professionally, as it proved to be more than once—notably in the Limantour case, to be noticed.

It had been agreed at college between Felton and Mr. E. J. Pringle that they would commence the practice of law in partnership, in San Francisco. The two young men were in college together two years, Mr. Pringle being the elder and graduating two years before his friend. This was an alliance between Massachusetts and South Carolina. Mr. Pringle, who is still in active practice here, came to San Francisco by the Nicaragua route, arriving in December, 1853. Felton sailed around the Horn, in order that he might thoroughly acquaint himself with the structure of seagoing vessels and with nautical terms, hoping to profit by it in admiralty practice. He never had much admiralty practice, however. He arrived here in the spring of 1854, and immediately formed a partnership with Mr. Pringle and commenced law practice. Both gentlemen had been admitted to the bar in the East. Felton came to San Francisco a young man, but thoroughly equipped as a lawyer. He had large resources of mind, great breadth of comprehension, wonderful inventive power as applied to principles, and astonishing quickness and exactness of observation. The faculty was his of finding out what the law ought to be, and what, therefore, it is, unless fettered by technicalities; and the adroitness and subtlety to use technicalities when they suited his purpose; but he preferred broad, catholic views upon all questions of right and wrong between man and man.

The city slip litigation was what first brought Felton fame and fortune. A. C. Whitcomb, now a wealthy resident of Paris, was then a member of the firm, its style being Whitcomb, Pringle & Felton. How Felton's name seems out of place at the tail end of a firm! *This* firm seems to have stood on its head. The eastern part of San Francisco had been laid off into water lots of uniform size, 25x59.9-12, except a slip now embraced within Clay, Sacramento, Davis and East streets, which had been left open for purposes of navigation. In December, 1853, the city sold this slip at auction to many purchasers—in lots 25x59.9-12. There was a great boom in real estate then, and the property brought enormous prices; terms, twenty-five per cent cash, fifty per cent in sixty days, and twenty-five per cent in four months. When most of the purchasers had made the second payment, but before any had made the last, there was a sudden collapse in the real estate market, the lots in question depreciating some fifty per cent. One of the purchasers consulted Felton, to see if there was not some way to repair the loss. After examination, he replied that the purchasers could recover their money from the city; one after another of the unhappy men went to Felton, until his firm became attorneys of record for every purchaser. About one million of dollars was at stake. Felton discovered that the ordinance of the Board of Aldermen, under which the lots were sold, was passed by a majority of those present, but not

by a majority of a full Board, while the city charter declared that every ordinance must be passed by a majority of a full Board. One of the Board had resigned, leaving only seven members. The ordinance was passed by a vote of four against three. Felton took the ground that the ordinance was invalid, and consequently that the sale was void; and that the purchasers could recover their money. The pioneer case in the long litigation that followed was *The City of San Francisco vs. Hazen* (5 Cal., 169). The city sued Kelsey Hazen, a real estate operator, to recover on his promissory note, given for a deferred payment. Judge Lorenzo Sawyer was then City Attorney. The case was very elaborately argued in the Twelfth District Court, by Sawyer for the city and Felton for the defendant. The lower Court gave judgment for the city, but on appeal the Supreme Court sustained Felton's position and reversed the judgment, with costs. But, as Judge M. C. Blake once said from the bench: "No man knows the law; only the Supreme Court can tell it." And the Supreme Court sometimes takes back its decisions. In the second city slip suit—*Nathaniel Holland vs. the City of San Francisco* (7 Cal., 361) the plaintiff sought to recover back the purchase money. The city called Hoge & Wilson into the case, and the District Court decided for the plaintiff. The city appealed. In the Supreme Court Messrs. Hoge & Wilson made the point that the sale of the lots was valid, because the city had ratified it; that the ratification consisted in the city's receiving the money, and by a subsequent Board of Aldermen making appropriations of the same. This view prevailed in the Supreme Court which stated that its decision was not in conflict with the prior one in *The City vs. Hazen*, inasmuch as the second, or ratifying ordinance, had not been cited to the Court on the appeal in that case.

In the case of *McCracken vs. the City*, reported in 16 Cal., 591, Judge Field ably and patiently reviewed the whole question. He held that the law was not properly laid down in *Holland vs. The City*. (The opinion in the *Holland* case was by Judge Burnett, Judge Terry concurring and Judge Murray dissenting). Judge Field held that the subsequent ordinance was not a ratification of the sale—that the city had not conveyed any title to the purchasers—that the city still owned the property and must refund the sums collected. Judge Cope, in a separate opinion, held that a purchaser, in order to maintain an action for money had and received, must first make a reconveyance to the city. Acting upon this all the purchasers made deeds to the city and got judgment against the city for their several sums. The Legislature, on April 17, 1862, passed an act providing that the purchasers should take the lots at an appraised value, they to be credited with all payments made, and the city to issue to them its bonds for the amount of the difference between what they had paid and what the lots were worth. In pursuance of this law the Supervisors, in 1863, passed an ordinance, under which the lots

were sold to the original purchasers on these terms.

All of these cases were argued elaborately and with great power by Mr. Felton. His connection with them made him very widely known and created for him a vast constituency of clients.

The very extraordinary case of Limantour, in which Mr. Felton made a fine struggle against fate, will attract the attention of times remote, on account of the unparalleled audacity and magnitude of the plaintiff's claim and the criminal romance which invests it. Jose Yves Limantour was a Frenchman, who, before coming to California to prosecute the largest claim ever presented to our courts, had lived some twenty years in Mexico, where he was a government contractor and dealer in arms. In the pursuit of that business he had greatly prospered, fattening on the misfortunes of the country, which was generally convulsed with civil wars. In 1841 he visited California and remained a year at Yerba Buena, now San Francisco. He met here the traveler and author, Duflot de Mofras, who was his countryman, and who advised him to buy land on this peninsula. In 1844 he made a second visit, and a third in 1847, his business in the latter year being to supply arms to the California forces then feebly struggling to save their native land from the grasp of Uncle Sam. His vessel, loaded with munitions of war, was overhauled at San Pedro by the United States sloop-of-war Warren, under Commodore Biddle, but a search revealed nothing contraband. He had learned that he was pursued and had thrown his cargo into the sea. Being allowed to proceed, he returned to Mexico, where he remained five years. In November, 1852, he came again on a mission of peaceful conquest, not as the representative of a foreign government, but as his own ambassador; not *vi et armis*, but with pockets full of parchments wherewith to subject the richest, and most populous part of the country to his legal dominion. Congress, in 1851, had passed "An act to settle land claims in California," and had established at San Francisco a Land Commission to pass upon all land claims based on Mexican titles. It was provided that no claim should be heard that should not be presented before the third day of March, 1853. In February, 1853, Limantour filed with the Land Commission eight claims to land, which, by reason of their magnitude and the profound ignorance of everybody concerning them up to that time, created consternation throughout the city and the adjacent country affected.

Limantour claimed, First—Four square leagues, comprising over 15,000 acres, covering the city of San Francisco, except a strip off the northern end. Second—Yerba Buena, Alcatraz and the Farallones Islands and Tiburon Point, which commands the strait between Angel Island and the Marin main land. Third—The Laguna de Tache, covering eleven square leagues. Fourth—The tract of eleven square leagues called Lup Yomi. Fifth—Eighty square leagues near Cape Mendocino. Sixth—The vineyard of San Francisco

Solano. Seventh—Six square leagues called Cahuenga. Eighth—The Cienega de Gabilan of eleven square leagues, which embraced the city of Stockton. The claims aggregated about 620,000 acres, and a money value which exceeds to-day, and did even then, the combined wealth of all the railroad magnates of the United States. A protracted judicial inquiry followed. Limantour asserted that the lands claimed by him were granted him at different dates in the years 1843 and '44 by Governor Micheltoreno in satisfaction of and reward for his services to the Mexican government in advances of money and military supplies. The Land Commission confirmed the first and second claims—those covering the city of San Francisco and the islands named—and rejected the other six.

An appeal was taken to the United States District Court, where Edwin M. Stanton was specially employed to assist the United States District Attorney, and Whitcomb, Pringle & Felton appeared for Limantour. Pending this appeal, a card was published by one Augustus Jouan, agent of Limantour, who had accompanied the latter from Mexico to San Francisco, setting forth that Limantour had broken faith with him, and that for a consideration, he, Jouan, would make a revelation that would defeat the Limantour claims. The citizens "saw" him, and he revealed. He said Limantour had frequently told him that his grants were fabricated; he had himself, at Limantour's request, altered figures to reconcile dates; that Limantour had shown him a letter from Robin—Limantour's partner—in which Robin, in consequence of a quarrel with Limantour, threatened to expose the latter as a forger of title papers; that Francois Jacomet, a clerk of Limantour, had declared that one Letanneur wrote one of the grants in 1852—nine years after its alleged execution. He suggested that Jacomet be sent for. Jacomet was prevailed upon to come from Mexico, and, in 1856, he gave testimony corroborative of that of Jouan. Letanneur, who was here in the city "on business," was taken before the grand jury, and there testified that he had written one of the alleged grants.

Mr. Limantour (whose name should not be given the French pronunciation, but should be called in broad English, Lie-man-tour—that's the way most of our citizens pronounce it), was tapped on the shoulder by a federal officer and locked up. The grand jury indicted him for forgery and perjury. He gave bail in \$10,000. One of his friends was willing and able to qualify on his bond, but a second surety was requisite. Messrs. Whitcomb, Pringle & Felton persuaded Michael Reese to come to the rescue. But Michael required a written obligation of indemnity from Whitcomb, Pringle & Felton before he would sign the bond. So great was the faith of these gentlemen in the validity of their client's title, that they promptly agreed to indemnify Reese. This is good enough proof that the insinuation against their integrity in this cause was baseless. The Land Commission did not find out any

fraud. The United States Court *discovered* no fraud. The villainy of the claimant was uncovered by an accomplice. After it was revealed, it was clear enough. Everybody wondered that it was not sooner found out. John B. Felton enlisted his great abilities in the cause, because he honestly believed it to be a great cause and a good cause. Its fraudulency was brought to light by a mere accident, and the most astonished man in the community was John B. Felton. To quote the Hon. Jeremiah S. Black:

"The genuineness of Limantour's title was attested by the signature of a Mexican Secretary of State, who had previously been a foreign Minister, and was afterwards (even after the fraud was shown) a Judge of the Supreme Court. It was sworn to by a Mexican statesman, who had a reputation as high as any of his class, and it was certified under the hand of the President of the Republic in a communication addressed from the National Palace at Mexico to the Land Commissioners. But all these seeming marks of authenticity were placed there to cheat and defraud. It was afterwards demonstrated and solemnly adjudged that Bocanegra's attestation was a shameless falsehood; Castanares was perjured; and Arista, the President, was engaged with the others in a scandalous conspiracy to impose on the courts of the United States."

Limantour, after a few months absence, returned to San Francisco with additional "proofs," and had his cause tried. Mr. Felton felt reassured, and made out what was considered a perfect case. But in the very first fruition of hopes long deferred, it was hinted that the impression on the alleged "grant" should be compared with the government seal! This was done, and at once many differences were apparent. The end then came soon, and Limantour was revealed as a gigantic forger and conspirator. Mr. Felton declined to argue the case. Limantour succeeded in getting safely out of the country. The government brought suit on his former bail bond for \$10,000, and recovered judgment against Michael Reese and his co-surety for the amount. An appeal was taken to the United States Supreme Court, Messrs. Whitcomb, Pringle & Felton being the real parties interested, as they had contracted to hold Reese harmless. They succeeded in getting out of it, but paid Hon. Eugene Casserly \$1,000 for arguing the case at Washington, he then being a United States Senator. The Supreme Court held that Mr. Casserly's point was good—that the sureties were released from liability, because the United States District Court had once continued the Limantour criminal case against his consent! There is a lawyer in San Francisco who is in the habit of referring, now and then, to a Supreme Court decision as "a beautiful decision." This was a "beautiful" decision. It takes a lawyer, though, to detect the beauty. A man outside the profession might be excused for insisting that Uncle Sam was entitled to this \$10,000. He was not suffering for it, however. He could lose it better than Whitcomb, Pringle & Felton could.

It would be tedious to go over the list of celebrated causes with which Mr. Felton was connected. Two of the most important of them were the mortgage tax case and the local option case. On the first the court, in a model opinion by Judge McKinstry, took Mr. Felton's view—that to tax a mortgage and also the mortgaged property as though it were not incumbered, is double taxation, and in some cases may be manifold taxation. In the local option case the question was whether the law was constitutional, which provided that the people of any city, town or township might by vote decide whether spirituous liquors should be sold in such city, town, or township. In the Supreme Court S. W. Sanderson and Lloyd Baldwin appeared for the temperance men, and John B. Felton and W. H. Patterson for the other side. None of these survive. Sanderson (an ex-Supreme Judge) and Felton were the men who studied and argued the case. It was another great triumph for Felton. He contended that the law was in direct opposition to the natural rights of man. The constitution of California, said he, declares these rights to be inalienable. The rights of property, life, liberty and the pursuit of happiness precede government, and the only limitation of these rights is the rule that they shall not be used to the injury of others. A man has the right of using or abusing his own property, provided that in so doing he does no injury to another. His natural rights can only be bounded, limited or restricted by the natural rights of others. The acts which a man can be prohibited from exercising over himself or his property must be *directly* and *necessarily* injurious to others. He cannot be prevented from using or abusing his own property merely because other individuals, or the community, are *indirectly* injured thereby. The right to use wines, beers, liquors, etc., is a natural right of property. It can only be limited or restricted by the Legislature, and then only so far as the exercise of that right interferes directly with the rights of others. If a man uses these articles in excess—to his own injury only, and not to the injury of others—he is exercising the right of abusing his own property, and, though blameworthy, is not within the prohibitory power of the law. If, through such excess, he becomes dangerous to the lives or property of others, he then becomes amenable to the law. But, the article, the abuse of which has led to his thus becoming dangerous, cannot be taken away from others, who are capable of using it in a proper manner. When an article capable of proper and legitimate use is also capable of being used to excess, and thus produce misery, the simple possibility of its being used to excess does not prevent it from being property. The Legislature can regulate the use of it, but cannot prohibit the use of it. The Local Option law prohibited the use of liquors. It was, therefore, void.

Continuing Felton's argument, if a man takes his own life by eating or drinking things that are unhealthy, so long as he is the only one injured,

the law cannot reach him. There is no power in the Legislature, if he is sick, to lend its sanction to the prescription of the physician. Though assured that what he is about to eat is sure death to him, the law cannot interfere. His actions are a source of grief and woe to his family, the grief may be a source of disease or death to his father or mother, but society has no correctives to apply and no punishment to inflict. The injury, though great, is indirect. His opinions are so perverted and backed with so much plausibility that, through their influence, another loses his faith in all religion, becomes a profligate or murderer, yet he is not an accomplice in the crime or a sharer of the punishment.

The minister who bought the place of Shakespeare, cut down the mulberry tree planted by the poet's own hands. The civilized world still execrates him for it. If Shakespeare had left the single copy of "Macbeth," or "Hamlet," or "Lear," to a friend, that friend could have destroyed it and caused incalculable damage to the world. The owners of the collections of Raphael, of Rubens and Titian, can destroy them and cause more evil than if an army were slaughtered. I may make such use of my land that property in the neighborhood will lose all its value. Yet the law is powerless. I may so conduct myself in my family that my wife and children cannot live with me. I may promulgate opinions which set society on fire. Yet, inasmuch as the injury resulting from all these things is not the *necessary* consequence, but only an indirect one—inasmuch as I have exercised a *natural* right without *directly* hurting another—I cannot be punished. I deserve punishment, but there is no one possesses the right to inflict it.

The natural rights that belong to the citizen cannot be taken from him without vesting absolutely despotic power in some one or somebody. Force, ignorance, the pride of caste, may ignore them, but, if suppressed, they will rend asunder any government. An able, bold judiciary must stand forever on the frontier which separates natural rights from civil rights. Spirituous liquors are property in all civilized countries. Their use is general. A very great class of persons make a good use of them. The Local Option law practically denies their use to the man of melancholy disposition, the man of impoverished blood, those enfeebled by disease and to the *temperate* man who can *use* the good things of this life. Why not regulate love? If I use ardent spirits discreetly, I do no harm to society, to my family or to myself. Why, then, interfere with me because another man uses them indiscreetly? It would be as reasonable to prohibit me from keeping horses, because my neighbor, a bad driver, may be killed by his; as reasonable to prohibit me from begetting children, because my neighbor is guilty of debauchery, adultery or rape; as reasonable to prohibit me from indulging in love, because an ill-regulated love in another leads to jealousy and crime. Love is the cause of more crime than drink.

I give the foregoing as a specimen of Felton's argumentative style, without reference to the moral aspect of the question.

Felton confined himself to civil practice. He probably took in larger fees than any other lawyer here. For their successful effort to break the Lick deed of trust, on behalf of Lick himself, he and Mr. T. H. Hittell received \$100,000. In the local option case he and Mr. Patterson received the same amount. He was the chosen counselor of Michael Reese and many other citizens who had great property interests. He paid little attention to politics, but on one occasion had aspirations for the United States Senate. It was in the campaign which resulted in the election of Newton Booth, as the exponent of a new, independent, shortlived party. The Republicans had settled upon Felton for Senator, in the event of their success. In that canvass Felton showed great power on the stump. He sometimes spoke for three hours or more without notes, and was most happy in thought and diction. He had a memorable controversy with Gov. Booth in that contest. The letters of the two rivals make fine reading. Chaste, classic, learned, trenchant—it would be difficult to surpass them in these respects.

Felton frequently lectured for charitable causes. He was a great friend of learning, and responded to the calls of schools and colleges for public addresses. He was regent of the State University from its foundation until his death. In October, 1867, he addressed the graduating class at the commencement exercises of Toland Medical College. He delivered the oration at the dedication of the San Francisco Mercantile Library. In October, 1868, he addressed the Grand Lodge of Masons. These and many other of his orations, besides quite a number of political speeches, were fully reported and have been preserved in immortal type. They are all alive with thought, and are strikingly graceful in expression.

He had the most expensive habits in the way of eating the most delicately cooked food that could be procured, and drinking freely of the rarest wines. When dining with friends away from home he always insisted on paying the whole bill—nobody else could spend a cent—and, as a little mark at once of his extravagance, goodnature and liberality, he always carried a pocket-full of fine cigars, that cost, at wholesale rates, not less than twenty-five cents apiece, which he distributed indiscriminately. He was a poor judge of men, and seemed to give little study to human nature. When he was a candidate for the United States Senate he had parlors at Whipple's St. George's Hotel, on Clay street, which were open to all men without distinction of politics, creed, race or color. The loafers and bummers thought a golden age had arrived. They made him think they were "making his fight," whereas, as the saying is, they did not control their own votes. Felton sent to those rooms, liquors and cigars which cost \$7,000.

A tippling friend met him on the street one day :

"They say, Felton, that we drink too much brandy and water."

Felton—They ought to be more discriminating. They should say that you drink too much brandy and I drink too much water.

Tippler—I guess we do drink too much, Felton.

Felton—Who authorized you to use the plural? Is it because you drink enough for two?

He once accompanied an acquaintance to see a great spiritualistic medium—a wise man from the East, who could answer all questions. Felton asked the medium where Beideman died. (J. C. Beideman, died in San Francisco, July 8, 1865, having been for some years the largest real estate holder in the city. He was a native of Philadelphia). The wise man said he could tell where Beideman died, if Felton would name three places, one of them to be the true place. Felton gave him San Francisco, Philadelphia, and his own native town, Saugus. The latter being possibly a name he never heard before, the luminary replied promptly, "He died at Saugus." Felton thanked him and withdrew. He often spoke of his visit to the oracle, and it afforded him great amusement to recur to it. He had religious views, and, like Henry Clay, hoped to become a Christian before he died. He leaned towards Unitarianism. A half bargain was once struck between him and a brother lawyer shortly after he arrived in San Francisco, that both should study for the ministry—Felton to become a Unitarian, and his friend an Episcopalian divine—and that they should pitch into each other from the pulpit, instead of at the bar.

Felton was a most forcible talker, never flowery or verbose. He was full of illustration, an adept at classic allusion, had a wide reach of information, had explored a vast domain in literature, was severe in logic, straightforward, direct. He was wonderfully quick in grasping the chief points of a case, and in argument was excited and vehement, borne alone on tremendous waves of enthusiasm.

With his peculiar temperament, it can hardly be said that he was industrious. Here he contrasted markedly with McAllister. He certainly was not fond of work, but he never tired of reading. He was fitful in exertion. His clients would sometimes pursue him day after day for weeks at a time, urging him to attend to their business. When he did take hold, he made up for lost time, frequently burning the midnight gas in his office. On such occasions he used stimulants freely.

This brilliant man was very generally beloved. Lively, genial, witty, generous to excess, his conversation "flavored with the essence of all good literatures," showing in every word and movement the well-bred gentleman, he was a most delightful companion, and those who enjoyed his friendship speak of him with the utmost tenderness and affection.

His bon mots were many. He said, probably, more good things than

any lawyer in the State. Seeing an Irish procession on Montgomery street, he called a friend's attention to the flag, and said: "That ought to be kept over the Caller's station in the big board of brokers." "Why?" "Behold the sham rock and liar!"

There was a certain lawyer of this bar who was afflicted with *cacoethes loquendi*. He delighted to talk to the dear people from the platform, and never let pass an opportunity to enlighten them, as far as he could, upon any subject—political, religious, moral, historic or esthetic. Mr. Felton met him on the street one day, and invited him to join him and a few acquaintances at dinner at a certain restaurant that evening. The "eloquent" speaker said he had to address the people that night at Platt's Hall, on the question: "What shall we do with our millionaires?" It was a theme of great public interest, and he hoped to see Mr. Felton among his auditors. "If you will excuse me, Mr. Felton," he added, "I had rather make a speech than eat the finest dinner ever cooked."

"And I, fond as I am of a good dinner, had rather starve to death than listen to you," was the retort. The intensity of Felton's repugnance can only be appreciated by those who remember how really fond he was of a fine dinner.

Judge T. W. Freelon, Judge Levi Parsons, John B. Felton, and a few others, consentaneous souls, once made up a merry mess of bachelors at Mme. Touchard's private boarding house. Felton's winning smile, when he joined his table companions, his exultant mirth and words of wit and wisdom, gave a peculiar charm to his presence, and made the dining hall the place of delightful daily reunion.

It was in 1860 that Parsons went to Sacramento to urge the passage by the legislature of his famous "Bulkhead bill." Felton accompanied him as his friend and legal adviser. The epicure always had reason to murmur at the Capital, but at that time some culinary Solomon had established there, at a convenient point, a first-class French restaurant. To this refreshing shelter would Parsons and Felton retreat every evening with their invited guests. Many times did they repair thither, sometimes hopeful, sometimes dejected, but always exhausted. The struggle in the legislature was long and stubbornly contested; the shock of battle was felt throughout the State. Doing effective and silent work each day, Parsons and Felton withdrew from the conflict with a new coterie of friends every night. San Francisco was anathematizing them, but they stood, "unmoved, enduring and immovable." Every day there was a great din in the metropolis, and every night there was a great dinner in the Capital. Judge Freelon met the two warriors in Sacramento in the heat of the strife, and they told him that a seat would be reserved for him at their table that night. "But I ought not to partake of your hospitality while I am opposed to your scheme," said the Judge. "It

doesn't matter," responded Felton. "You must come to-night, and every night during your stay in town. We never talk 'bulkhead' at the table." Judge Freelon concluded to go. He was so well entertained that he went every night until he left the Capital. But he did not hear the word "bulkhead" mentioned at the princely table of the great Bulkheader.

This famous bill proposed to grant to the San Francisco Dock and Wharf Company (composed of Dr. H. S. Gates, J. Mora Moss, John Nightingale, Abel Guy, John B. Felton, John Crane and Levi Parsons—the latter being the great head of the concern) the right to build a bulkhead, or sea wall, with the necessary piers, wharves and docks, upon the water line of 1851, with the right to collect dockage, wharfage and tolls; also to construct wharves and piers, projecting at right angles from the sea wall, to a length of 600 feet; also to appropriate and take possession of any franchise rights, lands or wharves belonging to the city, and also private property on making compensation.

The feeling of the people of San Francisco was reflected by the Governor, Hon. John G. Downey, whose veto of this bill made him the popular lion of the time. Governor Downey said, among other things, that from the time when the act should become a law, "all commercial intercourse with San Francisco would be effectually cut off, or be carried on upon such terms as the Dock and Wharf Company might dictate. The products of every branch of domestic industry as well as every article of foreign trade, all imports and exports, all vessels approaching the shore, and vehicles approaching the water, might be subjected to contribution. Foot passengers only, but not their baggage or effects, would be exempt from tribute. The right to construct the front streets, or to build a bulkhead, with the necessary piers, wharves and docks, and to fix and collect tolls, had been granted to the City and County of San Francisco, not in the same words adopted in this bill, yet in terms not less comprehensive and effectual. This bill attempts to divest and impair rights of property, which are to be regarded as contracts. It also empowers the company to take private property, not for any *public* use, but to facilitate a private enterprise. And it is plainly repugnant to the Federal Constitution and the Constitution of this State."

When the legislature had passed the Bulkhead bill, and Governor Downey had vetoed it, and the legislature had failed to pass it over the veto, and San Francisco was turning out en masse to do honor to the Governor, Judge Freelon (who, not long before, had made a public anti-Bulkhead speech) was marshal of the great procession which met His Excellency at the boat and escorted him to his hotel. The observed of all observers, he was observed most particularly by Felton and Parsons.

Felton's conversation was fresh, original and sparkling. His wit was abundant, and was set off by the most spontaneous, exuberant and contagious

laughter of his own. Herein, he closely resembled his distinguished father-in-law, Judge Joseph G. Baldwin. Baldwin was full of fun, and laughed uproariously at his own jokes. Baldwin and Felton never impaired the effect by their turbulent enjoyment of their own sayings. Their laughter seemed to follow naturally, and it was as refreshing to hear it as the wit that evoked it. It convulsed all who heard it. Of course Felton was intimate with Shakespeare. J. F. Bowman (who died in 1884), once entertained the members of the Bohemian Club with a disquisition on the authorship of the Shakespeare plays. Felton heard of it and asked Bowman if there was really any basis for the claim that Bacon was the true author. He was assured that there was a good deal to be said in favor of the Baconian theory. Felton and Bowman oystered together that night, and Felton listened with great interest to Bowman's recapitulation. In the discussion that ensued, Felton astonished Bowman by his thorough Shakespearean scholarship. He spoke with enthusiasm, and Bowman wondered if his friend had not made Shakespeare the special study of his life.

The profession, and the people heard with genuine sorrow of the death of this unselfish spirit, this master of the law. In the Supreme Court, Mr. Pringle, his old college mate, friend and partner, and his ardent admirer, Clark Churchill, since Attorney-General of Arizona, paid tender tribute to his memory. Eminent counsel made appropriate remarks in all the courts, and the judges responded with feeling. The bar memorial, addressed to the courts—a classical production—was from the prolific pen of Joseph W. Winans. I doubt if Mr. Winans ever wrote anything finer than this, of which I offer two extracts.

"To the profession of his choice he consecrated the supremest labors of his life. With him the law was no narrow system, fettered by precedent and cramped by forms, but a broad, comprehensive science, devised by the highest wisdom, for the proper direction and government of man in all the relations of society and State. Imbued with such a conception of its dignity and objects, he was singularly successful, through the soundness of his reasoning, the persuasion of his address, and the resistless power of his logic, in eliminating and bringing into practical enforcement those great principles of truth and right which constitute the theory of jurisprudence. It was the aim of his mental effort to convince the understanding, rather than inflame the passions. Possessing a faculty for accumulation almost unexampled in the practice of the law, he made no idol of his acquisitions, but what his toil had won his liberality dispensed with lavish hand. In his munificence he was a prodigal; in his hospitality, a prince.

"His life, though blasted in its prime, was fruitful of achievement, and his memory is fragrant with reminiscences of noble words and manly deeds. Contemplated as a patron of the arts and sciences, a promoter of public and private enterprises, and a philanthropist, he was in each capacity alike conspicuous; and severely will be felt the absence of that stimulating hand."

Of Felton, let me recall last what I love to recall best—his own noble utterance in closing the oration at the dedication of the Mercantile Library building, at San Francisco, June 18, 1868:

"And now," he said, "I dedicate this temple to the true mercantile spirit—to the spirit of true honesty, which, rejecting the letter of the written contract, looks to its spirit; which, disdaining all deceit, all mean and petty advantages, takes the just for its rule and guide; to the spirit of true equality, which, stripping off from man all accidental circumstances, respects and reverences him according to his merit; to the spirit of enterprise, whose field is the earth, the air, the sea, the sky, and all that in them is; to the spirit of munificence, that never tires in lavishing its treasures on all good objects, on the scientific expedition, on the library, the University, on the cause of religion, and on the soldier battling for the right; to the spirit of loyalty, that submits calmly and patiently to that great bond which holds society together—the law—which aims to reform, but never to resist or overthrow; to the spirit of patriotism, which follows with affection, pride, and devotion the daring mark of our country's flag; and to the spirit which worships God."

CHAPTER IV.

Joseph P. Hoge—Sage of his Party and Nestor of the Bar—His Record in Congress—A Colleague of Stephen A. Douglas and E. D. Baker—The Oregon Question—The Wilmot Proviso—The Galena Lead Mines—At the Bar in Three States—Humorous Notes—A Long Prosperity and a Green Old Age.

It would seem to imply a lack of respect to refer to this venerated Nestor of the San Francisco Bar as plain Mr. Hoge! But such he is, and no more. He is no Colonel at all, except by courtesy. He never had his "baptism of fire," as Napoleon III. styled it, or, to use the heroic speech of Caleb Cushing, he was never immersed in "the red baptism of the battlefield;" nor was he in the militia, even. "I tell you it is a great thing," said the versatile William H. Barnes (not William H. L. B.), in one of his capital temperance talks, "I tell you it is a great thing to be able to do something for your fellow man." It is very true. And the man who can make a Colonel, or a General, or a Governor of another by his own simple fiat, has not lived in vain. When the late Benjamin F. Washington, once collector of this port, and for so many years editor of the *Examiner*, arrived at Sacramento in 1850, after a weary tramp across the continent, as soon as he had washed himself and put on a clean shirt, he was ushered by General A. M. Winn (who later founded the order "Native Sons of the Golden West") into a little circle of pioneer upper tendom, where some half dozen ladies were trying to accommodate ten times as many gentlemen in the labyrinths of the dance. "Ladies and gentlemen," said the General, "let me introduce Colonel Washington, of Virginia." "That's the way I became Colonel," the Colonel told me in 1870. When Judge George W. Tyler concluded to make "General" Cobb he only spake the word, and it was done. I refer not to H. A. Cobb, the militia General, who, by the way, had his birth in the Azores Islands, but to Moses Gill Cobb, of Boston. Judge Tyler and M. G. Cobb were about forming a law partnership in Stockton. The former had been County Judge of San Joaquin, and having a title, determined that his partner should, for the sake of the firm, enjoy a like dignity. So he introduced him to all Stockton during the first week after his arrival as "my partner, General Cobb, gentlemen." "Yes, I made him a General," said the Judge to me in 1874.

After this fashion did Joseph Pendleton Hoge become a "Colonel," and his military creator was a Galena editor, who did the business about 1840. It seems that plain "Mr." is too common a title for a man of fame, even in a Republican-Democratic country. The tendency is to distinguish by some higher style those who have won our special regard. So it is generally accepted all over the Pacific slope that if J. P. Hoge is not a Colonel he ought to be. It seems entirely out of place to say "Mr." to him, or of him. No Judge on any bench would address the Colonel thus. Imagine Chief Justice Searls saying in open court, "Mr. Hoge, will you state that proposition again!"

Colonel Hoge is a native of the great State which has become a new mother of statesmen, and which has been doing so much for the country of late years in the way of supplying it with officeholders. He was born seventy-six years ago, according to our Great Register. He studied law and was admitted to the bar also in Ohio. He received what is called a classical education, graduating from Jefferson College, Pennsylvania. When he was about thirty years old he removed to the Prairie State, settling at Galena and there entering on his profession. He soon became popular and moderately prosperous. An inborn love of politics was his, which has ever since asserted itself, but which was never so strong as to require medical treatment. He has not been "discharged cured," because he has not needed curing. He has always desired to be United States Senator, but has never set his heart upon it.

The Colonel had not been long in Galena when the Democracy sent him to the Twenty-eighth Congress. In the campaign which preceded his election he made many brilliant stump speeches, and took his place among party leaders of the great West. At Washington his was a prominent figure, and he was returned to the Twenty-ninth Congress. His political period was 1843-47, and in the House of Representatives, during his four years of service were these eminent men: Hannibal Hamlin, Robert C. Winthrop, John Quincy Adams, John P. Hale, Hamilton Fish, Washington Hunt, Henry A. Wise, R. Barnwell Rhett, Howell Cobb, Alexander H. Stephens, Lynn Boyd (once Speaker), John W. Jones (once Speaker), Garrett Davis, Andrew Johnson, Cave Johnson, John B. Weller, Robert C. Schenck, Joshua R. Giddings, John Slidell, Robert Dale Owen, Thomas J. Henley (since prominent in California and father of the brilliant advocate, Barclay Henley), John A. McClernand, John Wentworth, Stephen A. Douglas, Jacob Thompson, David Wilmot, E. D. Baker, John A. Dix, Beverly Johnson; while in the Senate during the same period were: Levi Woodbury, Silas Wright, W. L. Dayton, Rufus Choate, James Buchanan, Wm. C. Rives, John J. Crittenden, Thos. H. Benton, Robert J. Walker, John C. Calhoun, Thos. Corwin and Lewis Cass.

The Congressional Globe discloses that on March 26, 1844, Col. Hoge presented the petition of L. W. Guiteau and fifty-six others, citizens of Stephenson county, Illinois, praying Congress to make appropriations for the immediate improvement of the Missouri and Upper Mississippi Rivers. The chief petitioner was the father of him who was destined to be President Garfield's assassin. On April 3, 1844, he spoke in favor of the bill introduced by him March 6, 1844, directing the sale by the government, of the reserved lead mines of Illinois, Missouri, Iowa and Wisconsin. In this debate he had a tilt with Cave Johnson, of Tennessee, afterwards Postmaster General under President Polk. He alluded to Johnson as "the Cerberus of the Treasury," when Cerberus turned upon him and charged him with indulging in ridicule and personalities, which he promptly disclaimed. Johnson "expressed his satisfaction at the explanation of the gentleman," but wanted to know what the gentleman meant by calling him the Cerberus of the Treasury. He continued that he had always gone as far as any man in liberality to settlers. If he had his way, he would not sell an acre of the public domain, but give the soil to those who settled upon it in good faith. He opposed the pending bill because he wanted to keep the lands out of the hands of speculators. He desired to see some other plan adopted for their disposition.

Col. Hoge did not reply. The bill was defeated, but on reconsideration was amended so as to make the minimum price of the lands five dollars per acre, and as thus amended passed the House by 92 to 71. But in the Senate, being referred to the Committee on Public Lands, it was there smothered.

On December 10, 1844, Colonel Hoge introduced another bill, directing the President of the United States to cause the reserved lead mines of Illinois, Iowa and Wisconsin to be exposed to sale. The bill was referred to the Committee on Public Lands. This bill shared the fate of its predecessor.

At the first session of the Twenty-ninth Congress, Dec. 19, 1845, Colonel Hoge introduced a similar bill, which was referred to the Committee on Public Lands. When the bill came up, June 1, 1846, an amendment making the minimum price ten dollars was offered and rejected. Another amendment making the minimum five dollars was then offered. Colonel Hoge spoke at length against the amendment. He said the settlers could not pay so much, and declared that the lands were chiefly valuable for agricultural purposes. On June 9, 1846, the bill was passed in the House with the five dollar amendment. It went to the Senate, and came back with another and longer amendment, and the House amended it further and finally passed it, in a shape obnoxious to those who favored the original bill.

On January 30, 1846, Colonel Hoge made a powerful and brilliant speech in the House of Representatives, on "The Oregon Question," which so long agitated Congress and the country. He took strong ground in favor of "Fifty-four Forty, or Fight." "I do not like," he said, "the patriotism which

counts the costs, which turns pale and trembles at the consequences ; which hesitates, falters and doubts when great national questions are to be decided, when great national interests are at stake." The question was on the resolution of Stephen A. Douglas, Colonel Hoge's colleague, declaring that a title to any part of the Oregon Territory south of 54 deg. 40 min. of north latitude is *not* open to compromise so as to surrender any part of said Territory. E. D. Baker, another colleague of Colonel Hoge's, although a Whig and English-born, came out bold and brilliant for "Fifty-four Forty, or Fight."

Colonel Hoge's speech, just alluded to, occupied fourteen columns of the *Congressional Globe*.

As everybody knows, we did not get Fifty-four Forty, and we did not fight. The country decreed a change of administration, calling to power a great party, one of whose rallying cries was, "Fifty-four Forty, or Fight ;" yet the President of its choice (I do not say it in criticism or censure) suggested to the British government a settlement upon the forty-ninth parallel as the dividing line. It is said that Mr. Buchanan, Mr. Polk's Secretary of State, felt bound to make this offer, because it had been made by Mr. Tyler before him. It was declined by Mr. Pakenham, the British representative, whereupon Mr. Buchanan withdrew the offer, setting forth in a fine state paper the justice of the claim of the United States to the whole of the north-west Territory. Subsequently, the British government expressed its readiness to accept the forty-ninth parallel as the dividing line, if the offer of settlement were so modified as to secure to Great Britain the whole of Vancouver Island. This it announced as its ultimatum. President Polk submitted this proposition to the United States Senate, which advised its acceptance, and it was accepted. In June, 1846, a treaty was signed between the two governments, declaring the forty-ninth parallel to be the dividing line. And thus was surrendered the country's claim to a vast region which it had, with loud acclaim, declared its readiness to fight for ; an area as great in extent from north to south as that of the State of Oregon added to one-half of Washington Territory.

The famous "Wilmot Proviso" came before Congress while Colonel Hoge was a member of the lower House, and he voted for it. He has been censured therefor by many of his party. Owing to the subsequent events it has been a very long while since his vote on this measure has been criticised however. The "Wilmot Proviso" was one of the entering wedges which split the old Democratic party in two. On August 8, 1848, while the House was considering the bill to place \$3,000,000 in the hands of President Polk, to negotiate a peace with Mexico, Mr. David Wilmot, of Pennsylvania, a Democrat, but a Free Soiler, offered his celebrated amendment: "provided, that, as an express and fundamental condition to the acquisition of any territory from the Republic of Mexico by the United States, by virtue of any

treaty which may be negotiated between them, and to the use by the executive of the moneys herein appropriated, neither slavery nor involuntary servitude shall ever exist in any part of said territory, except for crime, whereof the party shall first be duly convicted." This was adopted in the House by a good majority, every Northern man voting for it, except two of Colonel Hoge's colleagues, Stephen A. Douglas and Jno. A. McClernand. It was being debated in the Senate when the hour arrived for the final adjournment of the session. When Congress next met, Mr. Wilmot again offered his proposition, and, after a long and heated struggle, which spread excitement and alarm throughout the country, the House again adopted it, and again it went to the Senate.

The Senate now struck out the Wilmot Proviso from the \$3,000,000 bill just mentioned and sent the bill back to the House. The House, in Committee of the Whole, March 3, 1847, again tacked on the proviso by a vote of 90 to 80. But, strange to say, right afterwards, in the House, after the report of the Committee of the Whole, the previous question being ordered, and recruits summoned, the proviso was defeated by 102 to 97. Colonel Hoge did not vote on this motion. Mr. Wilmot then moved to lay the bill on the table. This was negatived—ayes 87, noes 114. The bill then passed *without* the Wilmot proviso—ayes 115, noes 81, Hoge voting with the Free Soilers in the negative. Allen G. Thurman, of Ohio, Democrat, voted for the Free Soil proviso in Committee of the Whole and in the House, but when the House rejected it he voted for the Three Million bill, with the proviso left off.

It is a curious fact that, while Colonel Hoge, who has through thick and thin, steadfastly to date preserved his allegiance to the Democratic party, voted for this celebrated proposition, it was yet opposed by Stephen A. Douglas, General John A. McClernand and even Daniel Webster.

At the close of the second session of the Twenty-ninth Congress, in 1846, Colonel Hoge resumed law practice at Galena. He had kept his office open while in public life, and during his second term in Congress had formed a partnership with Mr. Samuel M. Wilson, who removed from Ohio to take charge of his business. The firm of Hoge and Wilson practiced in Galena until 1853, when the two partners came to San Francisco in company and continued their business association here until 1864, when they "parted friends," always to remain such.

Colonel Hoge's life in California has been a very active one, politically and professionally. He has been conspicuous in State conventions, and was Mr. Casserly's chief opponent when that gentleman was elected to the United States Senate in 1869. He is the acknowledged sage of his party. He was President of the Constitutional Convention of 1878, and also pre-

sided over the body of Fifteen Freeholders of San Francisco, which prepared the defeated charter of 1879.

In his profession the Colonel has been eminently successful, having amassed a fortune of \$100,000. In 1880 I found by consulting the Supreme Court reports, that, either by himself or in connection with his long-time partner, S. M. Wilson, he had appeared in the Supreme Court of this State oftener than any other member of the bar, with four exceptions.

In arguing a cause, Colonel Hoge is always animated, his countenance full of expression and his eyes full of speech. His ideas are expressed with wonderful clearness. He argues a law question like a master. Bench and bar go to him for instruction. He is restive, however, in argument. He doesn't like to be interrupted by counsel or even by the court.

In the matter of business location, this veteran has shown rare conservatism: he still looks out to the south and west from the same sunny offices in Montgomery Block where he has prepared his briefs for thirty-four years!

In personal appearance he is striking. Only his gray hairs tell of his age. He is very lively in his movements. So also, his conversation is vivacious, and readily turns into a channel of play. Considering his age, his alertness of mind and body are remarkable.

I must tell a story of the Colonel before I part with him. If it is not true, it is yet perfectly harmless, and I get it from a warm admirer of his. The Colonel, ever since his arrival in California, and for some years previous thereto, has been distinguished for his habitual neatness of dress and his absolute purity of linen. It was not always thus, they say. During the first years of his practice among the rough miners of Galena, he is represented to have been very loose and careless in this respect. It chanced that, about the year 1843, he visited Philadelphia, where he heard a legal argument by that advocate of national renown, David Paul Brown. Brown was very graceful and impressive in his delivery, and always studiously faultless in his attire. Some friends who had accompanied Colonel Hoge into court asked him, as they left the chamber, what he thought of the great lawyer's effort. The Colonel replied that he could make a better speech himself. There seemed to be something on his mind, but he said nothing more. Upon his return to Galena a striking change was observed in his exterior, and ever since then he has been one of the best dressed of men.

I will close this chapter with an incident which illustrates the Colonel's love of fun:

In the Supreme Court, in December, 1876, while an argument was being addressed to the bench, Colonel Hoge, Judge Cope, and another leading lawyer were carrying on a conversation in a subdued tone, but not subdued enough, and Chief Justice William T. Wallace concluded to subdue it altogether. Not caring to openly rebuke such eminent counsel, one of whom

had once occupied a seat on that very bench, the Chief Justice beckoned to the bailiff and whispered something in the ear of that functionary, who then softly approached the talking trio, and in his turn whispered to each : "Judge Wallace says stop talking." Colonel Hoge, who was the last to hear the gentle command, straightened up in his chair, motioned the bailiff back and said to him, in a tone just loud enough to be heard by his fellow culprits : "You tell Chief Justice Wallace to — — —." The bailiff reddened up, glanced hastily at the Chief Justice, then, with a bewildered expression, moved to his regular station. There, for some time, he seemed lost in deep thought. Suddenly he brightened, and turned his eyes toward Colonel Hoge, with a look which plainly said : "May be you think I *won't* tell Judge Wallace?" Did he? I never heard ; but I hope he didn't.

CHAPTER V.

Samuel M. Wilson—Association With Joseph P. Hoge in Illinois and California—A Broad Practice and Princely Revenue—The Broderick Will Case—The Nitro-Glycerine Explosion, 1866—The Mining Debris Litigation—A Striking Instance of the Law's Delay—The Conflict Between State and United States Land Patents—A Seat on the Supreme Bench Declined—Meeting the Giants of the Eastern Bar.

As I turn to this bar leader, an observation of Prof. Max Muller recurs. It was in the address on Freedom before the Birmingham and Midland Institute, October 20, 1879: "If there is one among the leaders of English thought, who, by the elevation of his character and the calm composure of his mind, deserved the often misplaced title of 'Serene Highness,' it was, I think, John Stuart Mill." If there is one among the leaders of this bar, who, by the elevation of his character and the calm composure of his mind, deserves this title, it is Samuel Mountford Wilson. In him we behold no meteor of brief career, speeding along its dazzling track, but an orb of massive momentum, pursuing with stately motion an orbit well defined. Happily, as Starr King once said of the sun, "he has no French ambition for display." In him we see character,

"Constant as the northern star,
Of whose true, fixed and resting quality
There is no fellow in the firmament."

This gentleman was born in Steubenville, Ohio. When he placed his name on the San Francisco great register, June 2, 1866, he gave his age as 42 years—making him 63 in 1887. When he was four years old his father died. He attended Grove Academy a few years, but never received a college diploma, being compelled to maintain himself from the time he had the physical strength to do so. He read law in the office of General Samuel Stokely, a member of Congress from Ohio, pursuing Latin and other studies at the same time. After his admission he practiced at the bar in Steubenville a short time, when Colonel J. P. Hoge, who had a good law practice in Galena, Illinois, and who was then in Congress, invited him to Galena and offered him a partnership, which he accepted. This was in 1845. Colonel Hoge was thirteen years older than Mr. Wilson. They had known each other well in Ohio, where Colonel Hoge was also born, and where the Colonel's sister and Mr. Wilson's brother intermarried. While at Galena the District Attorney of the county resigned and Mr. Wilson was

appointed to fill the vacancy. The only criminal law business which he ever attended to, devolved upon him during his fragment of a term as District Attorney of Jo Daviess county. He never liked this branch of law practice.

Mr. Wilson first met at Galena the lady who became his wife. Having studied for his profession in the office of a Congressman, afterwards having effected a business partnership with a Congressman, it very curiously coincided that he should form a matrimonial alliance with the family of another M. C. His wife was a Missouri lady, daughter of John Scott, delegate to Congress from Missouri Territory, and the first Representative to Congress after the admission of Missouri as a State. Messrs. Hoge & Wilson remained in partnership in Galena until 1853, when they came together to San Francisco, closing their Galena business and continuing their partnership here. I do not recall another instance of such a far translation of an entire law firm at one time.

The old Galena firm held together in San Francisco, having offices in Montgomery Block and conducting a large business until in 1864, when it was "dissolved by mutual consent," over eighteen years after its formation. The old law partners have since steadily continued their friendship for each other, and each frequently takes counsel of the other in the conduct of important cases.

Upon the separation of Messrs. Hoge and Wilson the latter formed a partnership with his brother, David S. Wilson, which continued about one year and a half, when David S. removed to Iowa, where he was afterwards elected a Circuit Judge. In 1866, Mr. A. P. Crittenden joined Mr. Wilson, and the firm of Wilson & Crittenden continued until the death of Mr. Crittenden in 1870. From 1870 to 1874 Mr. Wilson had no partner, but retained Judge W. W. Cope to assist him in his business. In January 1874, Mr. Wilson and his second son, Russell J. Wilson, became associated in business, and the firm of Wilson & Wilson has since continued without change, other than the admission of another son, M. S. Wilson. Russell J. Wilson had been admitted to the bar by the California Supreme Court in October, 1873, and had not long before returned from Knox county, Ohio, a graduate of Kenyon College, from which college had graduated Judge David Davis, Judge Stanley Matthews, Henry Winter Davis, the peerless orator of Maryland, and many other men since prominent in the national councils.

Mr. Wilson has a larger income from his regular practice than is enjoyed by any other lawyer in California. He is attorney for a score of millionaires; also, for many of our most prosperous mining companies; for the Safe Deposit Company; for Wells, Fargo & Co., which corporation, by the way, is organized under the laws of Colorado; also, for the Bank of California, the original articles of incorporation of which he drew when the institution was located at the southwesterly corner of Washington and Battery streets, in

1864. He also frequently appears as attorney for the Central Pacific Railroad Company.

Mr. Wilson is a methodical, patient, tireless worker and investigator. With the aid of his sons he wields his immense practice without difficulty. While perfectly unassuming, he has the fullest confidence in his capacity, as may be inferred by his opposing, single-handed, as he has done, the giants of the eastern bar before the most august bench in the land. He equips himself in complete armor for every encounter. His library is well selected, and in utility and number of volumes is not exceeded by any private law library in the State. He has what is called a legal mind—a well balanced mind. He is a lawyer clear through, and makes law his constant study. He loves the science. He has a genius for work. His habits are excellent—his life blameless. He has a reflective cast of mind, a fine judgment, a vast fund of common sense. His success, therefore, is not at all surprising. Success was his destiny.

I have heard some good lawyers assert that Mr. Wilson was at his best before a jury, while others say his place is before the court. The truth is, he is good in either position, but not being a magnetic or eloquent speaker his jury addresses are not powerful appeals. His delivery is quiet and deliberate, his speech plain. He very rarely touches ornament, and, while always earnest does not often warm up. Simple in his tastes and dress, free from haughtiness and affectation, he yet possesses a more magisterial air than any bar leader here. He enjoys the unqualified respect of the entire bench and bar. Both in and out of court you recognize in him the thoughtful counselor and well bred gentleman. And the high esteem in which he is held by the profession is due not more to his legal ability than to the uniform gentility which marks his treatment of his brethren.

It would be tedious to briefly glance at one-half of the more important causes in which Mr. Wilson has appeared at this bar. In the mortgage tax cases, the Beale street cases, the New City Hall case, the case of Sill vs. Reese, the Black will contest, and many others which excited deep interest in the public mind, he was conspicuous, and generally led the successful side. The case of Cunningham vs. Ashley *et. al.*, tried here at an early day, involved the title to the lot of land on which Platt's Hall stands. The plaintiff was D. O. Mills' father-in-law, who built and owned the Nucleus Building. The defendants were Delos R. Ashley and Jesse D. Carr, the latter now a wealthy farmer in Monterey county, and Ashley afterwards becoming State Treasurer of California and Member of Congress from Nevada. Mr. Wilson was for Cunningham, and prevailed over John B. Felton, D. P. Barstow and John Garber. The case of Porter vs. Woodward, *et. al.* was brought to recover a part of Woodward's Gardens and adjacent grounds of large area. There were many defendants and some twenty-five attorneys appeared on their

behalf, but the defense was chiefly conducted by Messrs. Wilson and J. R. Jarboe. The plaintiff's attorneys were William H. Patterson and B. S. Brooks. The case was ably contested and was taken to the Supreme Court. The defendants were successful in the District Court and on appeal.

Mr. Wilson has done well to eschew criminal practice. In the line of civil business, he keeps farther from the people, his name is less before the public eye, he is seen less, but he is felt more. He is not suited to the bustle and excitement of criminal trials. His deliberation and judicial cast of mind, keep him off the stage where guilt and justice meet. He is not strong in appealing to the feelings, the passions.

"He has not learned the mystery of awaking
Those chorded keys that soothe a sorrow's aching,
Giving the dumb heart voice, that else were breaking."

But in the wide domain, which he has been so industriously exploring for so many years, his capacity for investigation, his powers of argument, his poise of judgment, have found a congenial field. They impress his mind upon the jurisprudence of the State. In court Mr. Wilson is of easy bearing, but not courtly. He keeps full notes and never mistakes evidence. He uses his books with much discrimination. His authorities are in point. He talks forcibly, but not finely. He is cool, clear, eminently practical, concise, cogent, logical. His style is strictly argumentative; there is no hurry, no fretfulness, no impatience. Having improved his office hours he enters the court-room "strong in the assured sense of present skill, in the calm knowledge that the hours will bear good fruit."

In our Superior Court, Department 2, 1880—Calhoun Benham appearing for plaintiff, Mr. Wilson for defendant—a jury being impaneled, Benham wanted to amend his complaint and proceed with the trial. Mr. Wilson objected, and insisted that if the amendment was allowed the trial should be postponed. "I prepare my cases," he said. "I have analyzed this complaint. I know just what the plaintiff will be permitted to prove under each count (holding up a list of his authorities). If this amendment is allowed I may desire to demur; or I may move to strike out; or I may answer it; I *prepare* my cases, so that when I come into court I may be able to assist the court and jury."

John M. Burnett (sotto voce)—And to beat the other side.

The oldest short-hand reporter in California, the late A. J. Marsh, gave it as his opinion that Mr. Wilson was the most subtle cross-examiner he ever heard, except Durant, of Boston, a contemporary of Choate. Speaking of Choate, who was never properly reported, the reporter whom I have just named, stated that there were a dozen short-hand gentlemen in San Francisco who could report Choate's speeches verbatim. This he said in 1881.

Mr. Wilson has appeared in the Supreme Court of the United States

more frequently than any member of the California bar. One of the most interesting of the causes which took Mr. Wilson to the highest tribunal of the nation was the Broderick will case. Broderick, United States Senator from California, shot in a duel by Judge David S. Terry, September 12, 1859, died four days later, as Harry Byrne afterwards died, without wife, parents, children, brother or sister. A paper, purporting to be the last will of Broderick, dated at New York City, January 2, 1859, was admitted to probate in our Probate Court, October 8, 1860. Under his alleged will John A. McGlynn received \$10,000, and the remainder of the estate went to George Wilkes, of New York City. McGlynn, Wilkes and A. J. Butler were named executors. The estate, consisting chiefly of land now in the heart of San Francisco, was sold to several hundred purchasers in 1861, under order of court.

A little over eight years elapsed, when, on the 16th of December, 1869, a suit in equity was instituted in the United States Circuit Court in San Francisco to set aside the probate of Broderick's will and have the same declared a forgery, and to recover the estate. The complainants were John Kieley and Mary, his wife, George Wilson, and Ann, his wife, and Ellen Lynch, all residents of Sydney, New South Wales. The bill alleged that the three women named were daughters of Catherine, deceased sister of Broderick's father, Thomas, and were the only heirs at law. The complainants excused their long delay in asserting their rights by declaring that they lived in a remote and secluded region in Australia; that they were illiterate and did not hear of Broderick's death until eight years after the probate of his alleged will.

The high position of Broderick, the tragedy of his death, his great popularity at the time, and the extensive possessions he left behind him, drew wide attention to this contest in the Circuit Court. The history of this controversy is replete with interesting facts and incidents. Mr. Wilson appeared with other leading counsel in support of the genuineness of the will, and interposed a demurrer, which was sustained, and the complainant's bill was dismissed. The complainants appealed, securing the services of I. T. Williams, who made an oral argument, and S. H. Phillips, who filed a brief. In the Supreme Court of the United States Mr. Wilson was alone for the defendants. He contended that a court of equity had no jurisdiction of the subject matter of the suit, the same being vested exclusively in the San Francisco Probate Court, and that the action was barred by the several California statutes of limitations. He made other points, but upon these just stated he obtained an affirmation of the decree of the Circuit Court. Considering the interests involved in this controversy, and the large number of persons affected, Mr. Wilson must have received a princely fee.

The case of Meeks vs. Olpherts, Sharon *et. al.*, in which Mr. Wilson

appeared for the defendants, was won by him in the United States Circuit Court in this city; and the plaintiff appealing, the judgment was affirmed. Mr. Wilson had Montgomery Blair against him in the United States Supreme Court. The action was to recover possession of a hundred-vara lot back of the Palace Hotel. This case reveals a striking instance of the law's delay. George Harlan, who once owned the property in dispute, died at San Francisco, intestate, July 8, 1850. Henry C. Smith took charge of the estate, as administrator, August 19, 1850, and afterwards resigning, Benjamin Aspinall was appointed in his stead, June 15, 1855. Aspinall settled up and was discharged May 12, 1864, having meanwhile sold the lot in question, under order of the Probate Court. At the time of the decision by the United States Supreme Court in *Meeks vs. Olpherts* (100 U. S. Reports, 564), A. D. 1879, the Harlan estate was still in court, where it had been twenty-nine years, Joel Harlan and Lucien B. Huff being then administrators.

The defense in *Meeks vs. Olpherts* was the statute of limitations, and the United States Supreme Court held: (1) The statute of California which provides that no action for the recovery of real estate sold by order of a Probate Court, shall be maintained by any heir or other person claiming under the intestate, unless brought within three years after such sale, applies to the administrator who made the sale as well as to the heirs. (2) When by lapse of time the action is barred against him, it is also barred against them, because the right of possession is, by the law of California, in him and he represents their interests.

In the official report of this case Mr. Wilson is presented to the world in italicized type as *Mr. S. M. Watson*. But, perhaps, Mr. Wilson was not working for glory altogether. S. M. Watson did not get the fee.

The case of *Sherman vs. Buick* (93 U. S. Reports, 209), was the initial fight of the conflicts between State and Federal patents for lands in the sixteenth and thirty-sixth sections, under the act of Congress of March 3, 1853. This case was instituted in 1872, in the Third District Court, Santa Clara county, to recover possession of the southwest quarter of section thirty-six, township five south, range one east, Mount Diablo meridian. The plaintiff claimed under a United States patent, issued May 15, 1869, while the defendant relied upon a State patent, issued January 6, the same year. The act of Congress referred to having granted to the State the sixteenth and thirty-sixth sections of public lands within the State, provided (section seven) that the State should respect the claims of persons settling in such sections *before survey*, the State to select other lands in lieu of those so settled upon; while section six declared that no settlement should be protected unless made within one year after the passage of the act. Samuel J. Sherman had settled on the land in dispute December 20, 1862. The land was surveyed by the United States in August, 1866, and Sherman received his patent from the

general government, as before stated, May 15, 1869, four months after the State of California had issued its patent to D. S. K. Buick. Sherman offered to prove these facts in the District Court, but the court excluded the evidence as immaterial, holding that at the time of his settlement the title to the land was vested in the State. On appeal to the Supreme Court, the judgment in favor of Buick was affirmed by a unanimous bench (45 Cal., 656).

The case was taken to the Supreme Court of the United States. Mr. Wilson, with whom were associated Mr. P. Phillips and Mr. George A. Nourse, representing the twice defeated plaintiff, and Mr. Montgomery Blair, the defendant, the latter took the ground that the grant of sections sixteen and thirty-six was a grant *in presenti*, and that, no settlement on the lands in controversy having been made by the plaintiff at the date of the act, or within one year thereafter, they were not excepted from the grant. Of eighteen authorities cited by this eminent counsel, nine were from the California Supreme Court. Mr. Wilson contended that the title to sections sixteen and thirty-six did not vest in the State until they were marked out and defined by survey; that until that was done, the grant was in the nature of a float; that the settlement of Sherman, having been made before survey, was within the exception contained in the seventh section of the act of 1853; that, accordingly, the grant did not embrace the lands covered by that settlement, and the State patent was an absolute nullity. The opinion of the court (by Justice Miller) held that there was no real conflict between sections six and seven of the act of 1853—that the apparent conflict (one provision being that settlements shall be protected if made before survey, the other providing that no settlement shall be protected unless made within one year after the passage of the act) was reconciled “by holding to the natural construction of the language and the reasonable purpose of Congress by which the limitation of one year to the right of pre-emption, in the sixth section, is applicable alone to the *general body* of the public lands not granted away, and not excepted out of the operation of the pre-emption law of 1841, as the school lands were, by the very terms of the previous part of the section; while section seven is left to control the right of pre-emption to the school sections, as it purports to do.” (93 U. S. Reports, 209.)

The judgment of the Supreme Court of California was, therefore, reversed.

The case of *The Ivanhoe Mining Company vs. The Keystone Consolidated Mining Company* (102 U. S., 167) involved the title to all the real estate and mines of the flourishing mining town of Amador City, California. Here was another conflict between two patents, one issued by the State the other by the United States. Mr. Peter Van Clief and Mr. Oliver D. Barrett appeared for the plaintiff; Mr. Samuel M. Wilson and Mr. George A. Nourse for the defendant; Mr. Benjamin F. Butler for the State of California, and the Attorney General for the United States. Mr. Wilson was again successful, the court holding that the grant of the sixteenth and thirty-sixth sections

of land to California by act of Congress of March 3, 1853, did not cover mineral lands—that it was the settled policy of the general government to exclude mineral lands from all grants.

John Parrott, the well known San Francisco millionaire, brought suit against Wells, Fargo & Co., in the United States Circuit Court in San Francisco to recover damages for injuries to the granite structure on the north-westerly corner of Montgomery and California streets, caused by the explosion of a case of nitro-glycerine in the charge of that company on the sixteenth of April, 1866. The dangerous explosive was brought here with other express matter April 14th, 1866, from New York City, by way of Panama. On the wharf here it was discovered that the contents of the box, which resembled sweet oil, were leaking, and on the sixteenth, in accordance with custom, the box was carried to the building mentioned for examination in the presence of the agents of the express company and the Pacific Mail Steamship Company, that it might be ascertained, if possible, which company should repair the loss. An employee of the express company, under instructions, with mallet and chisel, was in the act of opening the box when the contents exploded, instantly killing all present, among them Mr. Knight, a brother-in-law of Governor Haight, and Mr. Webster, a well-known citizen, the two gentlemen being agents of the two companies. Supervisor Bell, of the eighth ward, who was passing the building on the California street side, was also killed instantly. The building was badly damaged, and windows were shattered in a large number of other edifices within a circuit of two blocks. It cost Wells, Fargo & Co. \$6,000 to repair the damages to the part of the building occupied by them, Parrott's suit being for injuries to other parts of the same structure. Mr. Wilson, appearing for Wells, Fargo & Co., won this case in the Circuit Court and also on appeal. In the United States Supreme Court he was alone on his side, and, as the reporter states, he "argued the case thoroughly, on the precedents English and American." He had for antagonists Mr. R. M. Corwine and Mr. Benjamin R. Curtis, the latter, in the judgment of many, the foremost lawyer of the country. The court held that there was no negligence on the part of either the steamship or express company, nor of any of their agents or employees—that they had no knowledge of the contents of the box, and no means of knowledge; that nitro-glycerine was not then known as an article of commerce; and that the companies named, as common carriers, were not bound to inquire concerning the contents of the box, having no reason to have their suspicions awakened.

Mr. Wilson was also on the prevailing side—for the defendants—in the case of McGarraghan vs. The New Idria Mining Company. In this case he was opposed by Montgomery Blair and Matthew H. Carpenter. He was leading counsel for the hydraulic mining companies in their great contest with the farming interests upon the debris question—a great contest, indeed, and

a protracted one, 1880-1886. Many farms had been ruined by the flow of "slickens" from the mines, and the farmers, combining, sought to have the miners enjoined from committing further injury of this nature. In such a conflict Mr. Wilson's usual good fortune could not attend him. The issue marked the end of the long domination of the mining interests over those of orchard, and vineyard, and farm.

The case of the Giant Powder Company against the Vulcan Powder Company involved the constitutionality of the patent laws, so far as the same are designed to extend or renew patent rights. On the trial before Judges Field and Sawyer, U. S. Circuit Court, Mr. Wilson raised the point that the time for which a patent is originally issued cannot be extended, and the point was sustained by both of the sitting Judges. Mr. M. A. Wheaton was associated with Mr. Wilson on this trial, while Mr. Causten Browne was opposed. Mr. Browne is a Boston lawyer of repute, author of an approved work on the Statute of Frauds. He came out from "the hub" with much promise and confidence, to measure swords with Wilson, but was badly wounded and his retreat was precipitate. This recalls a refreshing memory of the great New Almaden case, tried in the same court. Our Eastern friends sent out three of the greatest lawyers of the country to present one side of that case; *but they found our Randolph on the other!*

It is worthy of especial mention that of the many causes in which Mr. Wilson has appeared in the highest tribunal of the United States, he met defeat in but one. This was the case of Eureka Consolidated Mining Company vs. Richmond Mining Company—error to the Circuit Court of the United States for the State of Nevada. This was an action of ejectment for mining ground of great value. Having met the ablest lawyers of the East in the argument of great causes, it was remarkable that in the only case he lost in the United States Supreme Court, he should have been vanquished by an attorney of his own local bar. His adversary was Harry I. Thornton, who is represented to have made a magnificent argument. The Eureka-Richmond case is reported in the 103d volume of United States Reports, page 839.

Mr. Wilson has not been active in politics, but has several times been a member of local conventions. Governor Haight once tendered him a seat on the Supreme bench, and wrote him a letter, earnestly pressing him to don the ermine, but he declined. With his old partner, Colonel Hoge, he was a member of the body of Fifteen Freeholders of San Francisco who prepared the defeated charter of 1879, and also of the State Constitutional Convention of 1878. Of the latter body Colonel Hoge was president, and Mr. Wilson was Chairman of the Judiciary Committee. He refused to sign the new constitution. He rarely addresses the people. Among the few occasions when he has done so may be mentioned his Fourth of July oration at Sacramento in 1860, and his address at the laying of the corner-stone of the State Capital. His latest

production outside of his profession was also his best—his eulogy upon Samuel J. Tilden, before the State Democratic Club, at San Francisco, shortly after the statesman's death in 1886. This he had written out, and he read it with fine emphasis and effect before a large and select audience. It was excellent in thought and expression, and is preserved in pamphlet form.

It may be added, that Mr. Wilson has husbanded an ample competence, and owns one of the most valuable and commodious private residences in the city. He is of fine personal presence, of medium stature, with dark features and high forehead. Having raised a large family, and become a grand-father, he still seems to "wear the rose of youth upon him," and at three-score-and-three he securely holds the proud eminence which has long been his of right.

CHAPTER VI.

Henry H. Byrne—A Picture of The Man and the Advocate—A Popular Idol But Distrustful of the Poor—Four Terms as District Attorney of San Francisco—Bouts with Baker and the Elder Foote—The Unfortunate Marriage with Matilda Heron—The Contest of the Actress for his Estate—Her Pathetic Story Told in Her Own Words—Explanation of the Last Will—Amusing Anecdotes and Reminiscences.

Henry Herbert Byrne whose period at the San Francisco Bar covered the eventful years 1850-71, was born in New York City. His father was Irish and his mother English. He was well educated at a French Catholic college in Canada. Admitted to the bar in his native city, he came to San Francisco at the age of twenty-six, without money or reputation. He soon formed a partnership with T. W. Freelon, and during all his professional life afterward was associated with that gentleman, except when the latter was on the bench. Byrne was District Attorney of San Francisco, for two terms 1851-52, 1853-54 and also two terms, 1858-69, 1870-71. In that responsible office he brought many distinguished rogues to justice, some of whom "felt the halter draw." He won encomiums from bench, bar, the community and the press. He was an able, faithful and diligent minister of the people. He was known only as a criminal lawyer. It is to be wondered at that he accepted the District Attorneyship for his last two terms, well knowing the arduous duties of the place, and having since he first occupied the office attained considerable reputation and wealth.

The most important trial in which he appeared was that of Mrs. Fair, charged with the murder of the prominent lawyer, A. P. Crittenden. He was then District Attorney. The trial was opened March 27, and closed April 26, 1871. Byrne made the closing argument for the prosecution, consuming two days, and this was published in full by Marsh & Osbourne, the official shorthand reporters, with all the proceedings of the trial. It was certainly an admirable effort, a fine exhibition of his power of invective, his unimpeded flow of speech, his subtle reasoning, the precision of his ideas and his varied learning. It is full of interest and attractive for all classes of readers. His quotations were many, but not lengthy, and not unduly frequent, considering the great length of his speech. He was, however, corrected several times by Mr. Cook, his chief opponent, in statements of the evidence. To give edge to his

points, beauty to his periods and emphasis to his conclusions, he quoted from, or made allusions to, Byron's "Don Juan," Pollock's "Course of Time," Byron's "Childe Harold," Lord Brougham's "Opinions on Politics, Law, Science, Education, Literature, etc.," "The Confessions of Rousseau," Sappho, "The Monk," of Matthew Lewis; "Little's Poems;" Mohammed, Milton, Shakespeare, Esculapius, Hippocrates, Locke, Jeremy Bentham, Edwards, Kant, Aristotle, Thackeray, Dickens, Michelet's "L'Amour," Marc Antony, Cleopatra, Lord Nelson, Lady Hamilton, Telemachus, Diana, Cæsar, Lucrezia Borgia and Daniel Webster. This address abounds with beautiful periods and striking passages, but it must not be supposed that because of its ornament it was not logical. It was argumentative, forcible, convincing. In reminding the jury of their responsibility, he said: "The juror's oath is not a by-play. It is held most solemn by all Christian communities where the jury system prevails. It is that chain which binds the integrity of man to the throne of eternal justice. And when that chain is broken, conscience swings from its moorings and society is again in a condition to resolve itself back into the original chaos out of which it was carved."

In examining the testimony of the medical experts for the defense which was to the effect that the accused was insane, he declared: "If these theories are correct, why, the mothers of posterity will produce nothing but a band of fools. I am rather inclined to think, after hearing the testimony of some of these physicians, that they have read "L'Amour," of Michelet, a crazy Frenchman, who, in the first instance, idealizes women, taking from them their blood and their brains, and then turns around and bows down before them as an idolater. There is no practical sense in the theories advanced. It is a reflection upon our mothers, upon our wives, and will send down to posterity a nation of fools, if these theories are correct." His most forcible and eloquent passages were hurled directly at the prisoner, and it would be out of place, probably, to repeat them here. Alexander Campbell was associated with Byrne in this case, and made the opening argument for the prosecution. The prisoner was convicted and sentenced to be hanged, but secured a new trial, and before she was again placed at the bar Byrne had gone out of office and passed away from earth.

He died at San Francisco, March 1, 1872, a few months after the close of his last term as District Attorney, aged forty-eight years. He had no relatives in California, and no immediate kinsfolk anywhere. A younger brother, Lafayette M. Byrne, died before him in this city. He had long enjoyed a valuable practice and had made some judicious investments in city real estate. His estate was appraised at \$77,798. It proved, before final settlement, to be worth \$90,000. All of this, after making a few small legacies, he bequeathed to his personal friend and brother lawyer, already well off, E. R. Carpentier.

The minor legacies were : To David Scannell, Elijah Nichols and H. H. Byrne Ciprico, a little son of George Ciprico, the barber, \$1,000 each, and to Mary Cross \$5,000. David Scannell had been Sheriff in the days of the great Vigilance Committee, and has now been for many years Chief Engineer of the Fire Department of San Francisco. Three of Byrne's nieces—Mary E. Holcomb, Catherine F. Holcomb and Julia H. Howard, daughters of a deceased sister—came from Connecticut and contested the will on the grounds of unsoundness of mind and undue influence. They were offered, and accepted from Mr. Carpentier, \$2,500, in full settlement, before trial.

Excepting James King of William, David C. Broderick, General E. D. Baker, and Thomas Starr King, no man was ever buried in San Francisco amid such genuine manifestations of popular sorrow as was Byrne. An immense concourse of mourners attended at St. Mary's Cathedral, where Father Speckels delivered a discourse at once impressive and ornate. Byrne had had Catholic doctrines instilled into his young mind, but through life after his maturity he claimed to be a freethinker, being a close reader and admirer of Darwin, Spencer, and others of that school. His partner used to tell him his freethinking was only skin deep, and, reminding him of Napoleon's saying : "Scratch a Russian and you'll find a Tartar," said he, "Scratch Byrne, and you'll find a Catholic." Byrne dwelt apart from all churches, creeds and religious forms, but as the supreme hour approached, after stoutly holding out against many friendly importunities, he permitted a visit from a Catholic clergyman, to whom he made confession. Personally, he was perhaps the most popular man who ever lived in our metropolis—more popular than Baker. Baker dazzled the multitude from an eminence ; Byrne thrilled them by actual contact. He had the faculty—not faculty, but fortune, because it was an attribute unconsciously possessed—of enlisting the affections of those with whom he conversed. Mention his name in San Francisco to-day, in any knot of men, and some one will say, "I knew Byrne intimately." The average man, after having two or three interviews with him, seemed to feel that he had been admitted unreservedly to his confidence. His funeral procession embraced hundreds of the poorer classes, in humble vehicles and on foot. In the Supreme Court the death of Byrne was announced to the Supreme Bench on July 11, 1872, by the Attorney General, John Lord Love, who made a brief address, and moved an adjournment of the court. Chief Justice Wallace, who had himself, as Attorney General, in earlier times, announced to our highest tribunal, the deaths of leading advocates, responded as follows :

The court recognizes the propriety of the motion submitted by the Attorney General. When a professional man, distinguished in the battle of life, exchanges his armor for the tomb, it is becoming that his surviving comrades pause and pay deserved tribute to his memory.

Mr. Byrne held repeatedly and for a long period of time, the responsible and im-

portant office of District Attorney of San Francisco. In the discharge of the duties of that position, he exhibited rare and admirable qualities. In that branch of professional learning peculiarly within the province of his public labors, he exhibited a profound knowledge of the law, accompanied with a forensic ability and eloquence rarely equaled at any bar, and which, together, advanced him to the front rank of the advocates of the country. That he filled his office to the satisfaction of the community and the benefit of the public, is attested by the general voice, and by his repeated elections to the place.

Firm, yet courteous, he endeared himself to his brethren at the bar, and won their admiration and respect for his talents and integrity, while we are assured of the affection inspired by his social virtues by the universal manifestations of sorrow at his grave. As a lawyer, he was learned, and as an advocate, eloquent and persuasive; as a public officer, he never faltered in the pathway of duty; as a man, he was unassuming, true and unselfish.

It is ordered that the proceedings of this occasion be entered at large upon the records, and, as a further testimony of respect to the memory of the deceased, the court will now adjourn.

Byrne was of short stature, but compactly built, with his head set firmly on his shoulders. His eyes and beard and hair were jet black, the latter abundant and curly. He walked with his head and shoulders thrown back, and his carriage was somewhat stiff. One hand was invariably pocketed. He had the aspect of great physical strength and solidity. He did not look the lawyer at all. His dress was plain and in good taste. His voice was most peculiar; it was harsh, sharp, screeching, a great impediment to his popularity as a speaker. No man with such a voice could attain distinction on the stump or in the lecture room, unless endowed with abilities of the very first class, as well as all the graces and magnetism of person. Yet he made the most of it. He had severely cultivated it under the ablest professors of voice culture, and it had these compensations: he never tired in speech, was never hoarse, and was always distinct. Nor did his voice steadily repel, but the auditor, on hearing him a second time, would gradually become accustomed to its tone and forget its oddity. Music he had studied *con amore*. He *knew how* to sing, and yet *could not* sing—his voice would not permit it. As to correctness of rendition, he could give you almost any popular air from any leading opera. He was quick, bright, apt at repartee, convivial, and a lover of fun.

He spoke off-hand always—that is, he never wrote out anything; but he marshaled his ideas and prepared his plans. He was a powerful prosecutor—watchful, all-seeing, intrepid, not afraid of man or devil. His invective was scathing—it made you shudder at times. Before a jury he was very rarely eclipsed. In force, animation, beauty of imagery and illustration, his jury addresses yield to Baker's only. While he could not stand against the silver tongue* orator before the masses, or on the stump, or in great conventions, yet

*The first use of this expression "silver tongue," so far as my researches have disclosed, was made by the poet Quintus Ennius, who has been styled "The Father of Roman Literature" [239-169 B. C.] Ennius referred to Cornelius Cethegus as "The Orator with the Silver Tongue." According to Forsyth, Cornelius Cethegus was the first Roman whose reputation for eloquence rests upon positive testimony.

did he at times burst into eloquence as lofty and impassioned as that of Baker himself.

Our advocate was in his speeches too fond of quotation—too fond of talking about the old Greeks and Romans, too fond of airing his stores of information. In quoting, he was sometimes inexact (several times so, in the Fair case), but generally he was correct and happy. He overfed his mind on books, and possessing a good memory (notwithstanding he had also a strong understanding and an original intellect), he found it difficult, now and then, to repel the stirring thoughts of great minds which pressed upon him, bringing “news from the empyrean.”

Many anecdotal reminiscences of Byrne are preserved. One day in Judge Freelon's court, in 1852 or 1853, when he was District Attorney, Governor Henry S. Foote, then a practicing lawyer here, demurred to an indictment written with Byrne's puzzling pen, on the ground that it could not be read, and did not appear to be in the English language. Judge Freelon called for Foote's demurrer, and, examining it, observed that its chirography was, if possible, more of an enigma than that of Byrne's indictment. Solomon could hardly have done better than the Judge in this perplexity. He directed each counsel to read his own pleading, which being done, the demurrer was overruled. If Governor Foote thought the indictment was expressed in Irish he heard Byrne perform the feat of reading it in English, with uninterrupted flow of language from beginning to end.

In a half jocular way, Byrne was in the habit of boasting that he was descended from an Irish king. He was wont to attach to himself certain persons, who accompanied him in his pleasures at table, etc., and whom he made his butts—whose flattery, however, was not altogether distasteful to him, but was taken as return for their entertainment. One of these was a certain well known “count.” Lafayette Byrne said, one happy night, that he had never really believed in his descent from an Irish king until he saw that his distinguished brother kept a fool—a practice, he understood, of royalty in the old times.

A man was indicted for mayhem—gouging out an eye, and Byrne, as District Attorney framed the indictment. This was demurred to, and on the argument, Byrne's attention was called to the fact that he had left an “i” out of a word. He replied, “Well, my offense is the same as the defendant's—each of us has put out an eye.” “But,” remarked a brother lawyer, “your offense is the greater in degree—you destroyed the whole sense of *your* victim; the defendant only partially destroyed *one* sense of *his*.” “And this is the first time,” added Byrne's partner (striking the District Attorney while he was down), “that I ever heard Byrne leave ‘I’ out.”

He would sometimes make a bull: “Mr. Policeman, how far were you behind this boy when you caught up with him?”

"I don't understand you, sir."

The court suggested that, perhaps, Mr. Byrne meant how far he had to run before he caught him.

"No, your honor," said Byrne, "I meant what I said. How many feet or rods were you behind him before you caught up with him?"

Failing to get any enlightenment on this point, he asked some other question. But he never would admit that he had blundered. Indeed, he never, in or out of court, would concede that he was at fault in anything. He was very obstinate. If he made a mistake, he would stick to it, would twist around it, climb over it, or dig under it, would obscure it with multiplicity of words, of allusion, of phrase, would do anything rather than let the court or jury see that he recognized discomfiture or defeat. He was, as are men of his temperament generally, very vain, but his vanity was perfectly harmless. He was never envious of other men's success in his peculiar line, and never underestimated the efforts of those with whom it was his hap to contend. Withal, he really possessed great simplicity of character. He would take advice from those qualified, in his judgment, to give it, and would follow it, so far as his impulsiveness would allow.

He enjoyed exuberantly life, literature, society; but, for many years before his death he seemed to labor under a burden which he vainly tried to shake off. As Dr. Griswold observed of Edgar A. Poe, he bore through life "the memory of a controlling sorrow." This was his unfortunate marriage. In the press of business, in hours of idleness, in the solitude of study, it was ever present.

Byrne was frequently pitted against Baker at the criminal bar. They, whose names I love to couple, delighted to cross swords with each other. "O, the blood more stirs to rouse a lion than to start a hare!" By a masterly stroke of cool presumption, Byrne once lifted Baker from his footing. The latter recited a fine poetic extract, and remembering Byrne's proneness to quote poetry, he turned to him and remarked, "I suppose the learned District Attorney is familiar with this quotation!" Byrne quickly responded with imperturbable front, "*I should think so; I wrote it myself.*" The "Old Gray Eagle" curved his neck. Would Byrne dare to confront him in open court on such an issue? Could it be possible that in the crowded court-room there were some who would believe that Byrne really wrote those lines, and that he, Baker, was ignorant of the author of his own quotation? But he soon recovered himself and replied: "I never before saw or heard this gem attributed to the learned counselor, but when he asserts his paternity, it is not for me to deny it. I cannot say I *know* he did *not* write it, but I am ready to take the witness stand and state under oath, that I read these very words in Milton before the gentleman was born."

"Great minds often think alike," said Byrne, quietly.

In 1854, in San Francisco, Byrne met and married Matilda Heron, whose almost faultless impersonation of Camille afterwards won her a widely extended celebrity. They married in haste, and repented at leisure, if ever a couple did. So little was known of this marriage that after Byrne's death, some eighteen years later, when Matilda Heron came from New York to contest his will, the announcement created universal surprise. Although he always ignored it, the marriage was a solemn fact. Col. Philip A. Roach was an intimate friend of Byrne both in New York and San Francisco. When the actress told her story to the public in 1872, Col. Roach made an investigation and found that she had been duly married to Byrne by Father McGinness of St. Patrick's Catholic Church at San Francisco, in 1854. I had this from the Colonel on November 29, 1881. The light that was thrown upon this unfortunate alliance came from the sentimental actress herself. In an affidavit filed by her in our Probate Court, August 28, 1872, in the matter of her contest of Harry Byrne's will, she thus expatiated:

In the Probate Court of the City and County of San Francisco, in the matter of the estate of Henry H. Byrne, deceased. City and County of San Francisco, ss.

Matilda Heron Byrne, at present in aforesaid city and county, being first duly sworn, says: I deny that I have a considerable quantity of, or any quantity of, or any real or personal estate, either in the State of New York or elsewhere, sufficient for my support, or held by me in common with Robert Stoepel, or held by Robert Stoepel for my benefit. I have not a dollar in the world, either in real or personal estate, nor is there any relation under heaven between Robert Stoepel and me, not even our only living child, the possession of which I have obtained through her father's proclaiming her illegitimacy. Since the dissolving of my marriage with Robert Stoepel, he has refused to pay one dollar towards the support of either his child or me. When my sad illness, caused by suffering through the overwhelming calamity of my domestic wreck, between those two men, Henry H. Byrne and Robert Stoepel, overcame me, Robert Stoepel refused to pay my doctor's bill or that of his child; refused to clothe or pay for the education of his child. What, then, can be meant by his now holding property for my benefit, I am at a loss to know. Before my leaving New York for San Francisco, Mr. Stoepel sent a messenger to me offering to settle on my child a large sum of money, if I would sell all right and claim to her. This when I was on the bed where I had lain an almost confirmed invalid for fifteen months, and whence I arose to recover, by act of habeas corpus, my little daughter, who was being kidnapped from me to be transported to an obscure and remote place in the Pyrenees. So much for the estate now being held for my benefit.

As to the suit alleged to have been commenced by me in 1869 against Robert Stoepel, if such suit was, or is, in existence, I have no recollection or knowledge of it whatever. About eighteen years ago I was married to Mr. Henry H. Byrne, with the agreement that I should remain on the stage for two years, with the hope, on my part, that I might achieve as great a success in the East as I had in San Francisco. After my return from Europe where I dramatized "Camille," studied under the best masters, and purchased a complete theatrical wardrobe, there was not one prominent manager who would open his doors to me. It was failure after failure. The large amount of money I spent in Europe, and what I sunk in San Francisco under bad advice, had now impoverished me. To Mr. Byrne I faithfully depicted every disaster.

The two years passed; he came, as by promise, and, as I thought, to claim me.

I was in Philadelphia, in the bosom of my family. Mr. Byrne remained three weeks in New York, without even writing to me. Even this I forgave.

At this time an engagement in Pittsburg was opened to me, whither he at length followed me, accompanied by two members of my family. Inquiring why he so neglected me, he answered he had been led astray by some California friends. This, I also forgave. During the four days he remained with me, we discussed all my professional calamities, wherein I told him my sorrowful conviction that I never would be the great artist my soul had so long hungered to become, and that now I was perfectly resigned to follow him and his fortunes. To all of this the dear gentleman most evidently thought a great deal, but very little answered.

The last morning came. I was offered an engagement in Buffalo, and I asked, "Must I go to Buffalo, or may I go with you?" To which he answered: "Go to Buffalo."

Then and there we parted; I to Buffalo; he to his friends. One other year passed, when Mr. Byrne's letters came rarely. At last they ceased entirely. I could not believe he had failed to write to me, and so I mentioned it to my brother, Alexander Heron, President of Heron's Line of Steamships from Philadelphia to Charleston and Savannah, but my brother said, "Tilly, if you had one spark of your mother's pride in you, you would never speak to that man again; he has deserted you." This was a bitter blow to the young actress. A third year had passed since our marriage, since which I never received one dollar from him—not even a little token. After my first shock was over, I wrote to Mr. Byrne calmly, and, under the advice of my brother, asked for a divorce. An immediate reply came to me, in which he used these exact words: "Place this letter in the hands of a lawyer, and it will make you as free as the hour you were born." I placed the letter in the hands of a lawyer, John Hopper, of 110 Broadway, New York, and told him to procure me a divorce. About this time I had begun slowly to succeed in my profession, and it was not surprising that a young girl should have flatterers and snares about her. Often rehearsing "Camile," I envied the humblest woman in the theater who had a husband's protection. In New Orleans I met the conductor of our orchestra, who was polite, respectful and kind to me. We met again in New York, where he presented his parents, sisters and brothers to me; also, his brother-in-law, Vincent Wallace, the composer. They hinted a marriage. I told them I was poor. Robert Stoepel answered: "Wealth is impertinent: we will be poor together; I love you and will labor for you; it is your love I would marry, not your purse." I asked for time. Time passed and I played Camille in Wallack's Theater for 100 nights, achieving a great success. In that triumphant hour I did not forget the poor musician. After a successful trip all over the Union, I sought John Hopper, who told me my case was all right, and that I was a free woman. An inexperienced girl, how could I then know the world or its laws? And I was away from my only friend, my brother. John Hopper urged my marriage, assured me I was free to marry, and engaged his brother-in-law, Rev. Mr. Gallordet, to marry Mr. Stoepel and myself in St. Ann's Church, where, in the presence of a large number of friends, Mr. Hopper and his wife Rosalie placed Robert Stoepel's hand and mine together before the altar. Years passed, honor accompanied, and prosperity attended our mutual industry. Certain obligations called me to San Francisco. I left our happy home, where I left my only child and her father, and arrived here. The day after my arrival Judge —— called on me, and informed me that through an old friend he came on behalf of his client, Mr. Byrne, relative to a divorce which Mr. Byrne claimed. I was naturally annoyed, and requested to see Mr. Byrne in person, which the judge positively and imperatively refused. Worn by a long voyage, away from friends and home, in a strange land, I said it was not fair to bring me in such light before the

public, to which — — replied that the matter could be settled up in the country by parties there who would be operated upon to keep it secret. I answered : I did not know that that was the way in which justice was dispensed in California, and asked on what ground could Mr. Byrne make so outrageous a request. Whereupon, Mr. — read to me a certain paper, which I could not comprehend until he came to the word "adultery," when I told him to proceed no further. He then substituted for the odious word "desertion." Again I entreated an interview with Mr. Byrne, and again was denied, the judge adding, "Have you no pride? I tell you if Harry was weak enough to see you, I, as his counsel would forbid it. The man despises you." Next day I met Harry on my way to rehearsal. He turned ashy pale, and exclaimed, "Why, Tilly!" I asked what he meant by sending — every day to annoy me in the midst of my labor. He denied all knowledge of the affair, and an interview between us was decided upon.

Thereafter we had a long, serious and affecting interview, explanation and reconciliation. After that he came constantly to see me during my stay in San Francisco. During our long conversations Mr. Byrne's constant theme was my being his wife again. He forbade — ever to mention divorce to me. But the industrious — was not disheartened, for he reminded me that after I was two months married to Harry, the latter had sent me \$1,000 and that it would be a graceful thing to repay it. Well, I said, since you are so zealous in your friend's behalf, I will pay it. Sell that water lot, on which you insist he has been paying taxes, while I can prove my brother-in-law has been really paying them. Sell the lot—pay your client principal, taxes and interest on the same. The lot was sold for \$2,300. The purchaser refused to lay down the money until I signed it by my real name in the presence of Dr. Harris, Judge Freelon and some others. I took the pen and wrote "Matilda Heron," then, hesitating, I said: What else? and both Harry and Freelon answered aloud: "Byrne," which, to the best of my knowledge, I then signed.

In our next interview I asked Harry what on earth that signature meant, and he answered: "You are not Stoepel's wife, but mine; your property is mine; that beautiful home of yours is mine; you are mine; your very child is mine; you are my wife. Your divorce from me was either illegally obtained or fraudulent."

This intelligence pained me exceedingly. Just then I received a dispatch of my brother's death. I was obliged, even in my double affliction, to perform three nights. At last I broke down ill, and all that tender respect and love could do, Harry Byrne did for me. I had two physicians, but he sent his own. He sent Mr. Freelon to assure me that, if anything serious should arise from my illness, he would send a faithful messenger to accompany me home. I got well and traveled up the country. Not a city I performed in, scarcely a day passed, but brought a letter from Mr. Byrne. When it became necessary for me to go East, he became extremely melancholy, even to weakness. I could only arouse him by expressing the hope that I would return to him. He planned that we should go abroad for some years. I told him I would go home and state my position frankly to Mr. Stoepel. In parting with me he exhibited great sensibility and deep feeling. On my return to New York I immediately and frankly told Mr. Stoepel all, without a particle of reserve. Then arose a question of property between us. Mr. Stoepel saying: "Then if you should die Byrne can claim all." I answered: "These were Mr. Byrne's exact words." From that hour strife and confusion surrounded me. Between two husbands—my brother dead, a daughter's honor and my own involved—I knew not whither to turn. I made a retreat to the convent to compose myself, leaving which I was thrust into the Supreme Court by Robert Stoepel vs. Matilda Heron Byrne, to compel me to consent to a division of property as partners in business. I did not wish to divide our property, but to keep it together for the child, so I engaged Mr.

James T. Brady to defend the case. Unfortunately that gentleman in a short time died. On requesting his partner to resume the case that gentleman said: "Matilda, you will have trouble with Stoepel, for I have had a communication from Mr. Byrne who says you are his wife, that your divorce from him was not legal." Weary of publicity, disheartened, desperate, I left that office, and made over to Robert Stoepel every piece of property and every dollar I possessed on earth. From that time, too depressed to act, I was supporting myself and my child by my education, when two years ago I was prostrated by severe fever, and kept my room and bed for fifteen months. I was convalescent, and was sent in midwinter to the seashore, where the news of Mr. Byrne's death reached me; also, telegrams and letters telling me to come to San Francisco. I have come to defend my honor and my rights. From the investigations made by my lawyer in New York at the time of the litigation between Robert Stoepel and myself, I became fully satisfied, and do now firmly believe, there never was a divorce between Henry H. Byrne and myself.

[Signed] MATILDA HERON BYRNE.

Subscribed and sworn to this 27th day of August, A. D. 1872, before me,

[Seal] SAMUEL HERMANN,
Notary Public.

There was a compromise effected between Mr. Carpentier, the executor and legatee before named, and Matilda Heron. Mr. Carpentier's final account shows that Matilda Heron received \$1,000. The fact is, I have it on good authority, she actually received \$5,000.

The Mary Cross, to whom Mr. Byrne left \$5,000, was a young woman from Philadelphia, who learned the millinery art in the same institution with Matilda Heron, through whom she became acquainted with Mr. Byrne. She was Mr. Byrne's housekeeper in one of his houses, corner of Howard and Twelfth streets, and in his sickness showed him unremitting attention. He really was indebted to her for many acts of kindness. He was not married, and in periods of sickness and gloom, consequent upon excess of conviviality, he invariably sought her house and found hospitable welcome.

It has always been an enigma to the bar and the community that Byrne left his estate to a man who already had ample means and was not of his blood. This may clear the mystery: Byrne, while not a money worshiper, and while numbering among his ardent friends and admirers thousands of people in the humble walks of life, yet looked up to moneyed men, and cherished unfeigned regard for those who had displayed the ability to accumulate wealth. He sometimes repeated an expression which he attributed to his father, that "a poor man could not be honest." He had no near relatives to survive him. He did not want his estate squandered, and felt that it would not be appreciated if left to any impecunious companions. Among his immediate personal friends was one who knew how to make money and how to take care of it. Carpentier and Byrne, moreover, had known each other in the East. When Byrne, before the close of his second term as District Attorney, in 1854, went to New York on a visit, he left his

office in charge of Carpentier. The two men were both bachelors (Byrne practically, at any rate), and this tended to knit them closer together. Just as Byrne was about to pass into decline, and softening of the brain seemed approaching (in 1871) he told a friend that he would like to spend some years in Europe, but did not have the ready means. Like many other well-to-do men he sometimes felt that he was poor. He said he did not want to mortgage his property. This friend mentioned the matter to Mr. Carpentier, who promptly said that Mr. Byrne need not let money matters trouble him an instant—that he, Carpentier, would supply him with all funds required. This was communicated to Mr. Byrne before his will was drawn. Shortly afterwards Mr. Byrne was ill and on the bed from which he never arose. Mr. Carpentier visited him and seeing his serious condition, staid by his bedside day after day and night after night until the end came.

It seems, then, that although Byrne left his estate to one who did not need it, although he could certainly have done more good with it, he yet bequeathed it to one of whom he could say: "He was my friend, faithful and just to me."

CHAPTER VII.

Lorenzo Sawyer—With McDougall in Illinois—In the El Dorado Mines in 1850—The Early Bar of Nevada County—A Remarkable Murder Case—Honors in San Francisco—A Long Tenure on the Bench—Judicial View of the Chinese Question—The Authorship of the Sole Trader Act—The Principles of Masonry—First Meeting with the Eccentric Lockwood—References to A. A. Sargent, Judge J. B. Crockett, Jno. R. McConnell, E. W. Roberts, E. F. W. Ellis, Stanton Buckner, C. H. S. Williams, Roderick N. Morrison, Frank M. Pixley and Tiburcio Parrott.

Lorenzo Sawyer holds for life the most exalted judicial station in California, and his career on the bench has already been longer than any other in the annals of the State, except those of Judges Hoffman and Field. A quiet, unassuming man, his forensic record is yet full of interest, and to those who may have the idea that his life has been uneventful, I promise a pleasant surprise.

He was born in Jefferson County, New York, May 23, 1820. (Judge S. C. Hastings was born in the same county, six years earlier). Like the Shasters, who were born in Vermont, four and eight years before him, he had the blessing of a noble parentage, and, like them, reared in the home of honesty, simplicity, sobriety and frugality, he heeded every parental counsel, and has led a life of exceptional beauty and purity. His father has been dead some years but his mother lingered until passed ninety-two, dying on June 9, 1886, at Belvidere, Illinois. Their golden wedding was celebrated at that place, February 11, 1869, when there was a happy reunion of their descendants and relatives. On that occasion the Hon. Joel Swain Sawyer, of Minnesota, the next eldest son, delivered to the aged couple an affecting memorial address, which closed with these words:

"To the principles of morality, virtue and Gospel truth, early instilled into their minds, enforced by your examples, do your children owe whatever of good may appear in their characters, whatever of success they may obtain in life, whatever of public or private consideration and esteem they may inspire; and as a fitting return for your care, your integrity, and the other Christian graces illustrated by your daily lives, you now realize the assurance of the sacred proverbialist; your children shall arise and pronounce you blessed—as we do this day."

At this "wedding" a hymn was sung which had been sung at the

marriage fifty years before, to the same tune, Exhortation, and from the same books.

Lorenzo Sawyer was born on a farm, and lived there until his sixteenth year. In winter he attended the district school; in summer he helped to bear the harvest home. The neighborhood contained a large and excellent library, of which he availed himself at night and on Sundays. After passing a year at the high school at Watertown, New York, called the Black River Institute, he went with his father and family to Pennsylvania, where a new farm was located and cleared. The next eight years were spent in teaching school in New York and Ohio, and in reading law, which profession he had decided to follow before he first left his native State.

The first law office he entered was that of Hon. Gustavus Swan, who then led the Ohio bar in land controversies. Judge Swan soon retired from practice, and Lorenzo Sawyer then was received into the office of Noah H. Swayne, afterwards a Justice of the United States Supreme Court. There he had the benefit of excellent instruction until his admission to the bar in 1846. He then went to Chicago, and passed a year in the office of James A. McDougall, who was three years his senior, and who was then Attorney General of the State, and who afterwards represented California in the upper house of Congress. He then went to Wisconsin, settling in a little town which bore the name of his native county, and, forming a partnership with John E. Holmes, then Lieutenant Governor, commenced the practice of law.

The old Whig party is dead only in name. Its principles are interwoven with the country's life. Daniel Webster and Henry Clay—these were the men whom Lorenzo Sawyer followed in politics. He had pitched his tent, however, in a locality not very congenial to Whig ideas. His industry, good habits and strong common sense showed that he was the right man, but he was not yet in the right place.

He built up a lucrative law practice for that locality but he was ambitious, and his chance for political preferment in that region was not flattering. So, when the cry of "Eureka!" echoed around the world, he was glad to respond.

In July, 1850, he arrived in California, having crossed the plains with a company of young men from Wisconsin. It was a journey of seventy-two days—"an unprecedentedly short trip" they called it. Mr. Sawyer sent to the *Ohio Observer* many incidents of this trip, and his articles were copied by several Western journals, furnishing valuable data to emigrants who followed him.

El Dorado! Beautiful name, most appropriate for a county of California. In that county Mr. Sawyer first rested after crossing the plains. Like Judge Bennett, immediately on his arrival he went to work in the mines to get a stake. Finding that his profession presented a golden opportunity, he went to Sacramento and commenced law practice. He soon removed to Nevada

City. His career there was comparatively short, but was cast in an eventful period, and the history of the bar of Nevada county, which was written by the Hon. A. A. Sargent, makes Lorenzo Sawyer one of the most prominent figures of that day. His library at first consisted of eleven volumes, brought from the Prairie State. His brief life at Nevada was broken by a visit to San Francisco, where he had decided to locate permanently. Disaster here came upon him. The honors this people had in store for him were unrevealed, and, being twice burned out of his office, he returned to his mountain town, where he was destined to win great local fame.

In 1852 he was counsel for the defense in one of the strangest criminal cases on record. A woman of the world, "Old Harriet," kept a saloon on Broad street. A mountain stream, Deer creek, dashed by in the rear of her house—right through the heart of the town. It was an early day, and she had a business which "paid." At the foot of the street there had been a bridge, which was the highway of communication between the two divisions of the settlement. On Little Deer Creek, a mile off, on the other side of the main creek, was the mining camp of Pat Berry, a prosperous miner. Right across the street from "Harriet's" there was, perhaps, the liveliest dance-house to be found in "the mines." It was nightly visited by men of all conditions, who made night, and sometimes morning, "hideous" with their revelry. Among these festive arrivals were many who came from across the creek—from mining camps, here, there and everywhere.

During one rainy season a freshet broke down the bridge across the raging creek, but a tree was felled so as to afford a passage to footmen. At the time referred to the creek was a turbulent torrent, and went roaring and dashing and crashing through the town, cutting it in two, with only the fallen tree for a footway between the two sections. On one Saturday Pat Berry came to town. He had made money during the week, and brought it with him. Arrived in town he bought an entire new outfit of outer and under-clothing. After dinner he went to the dance-house, and spent an hour. Then he crossed the street to "Old Harriet's." He was seen at the latter place at a late hour. But thereafter he was never seen alive.

A cry of "murder!" rang out upon the air that night, but not being repeated those whom it aroused gave it little thought.

But where was Pat Berry? His nude body was found in an eddy of the creek, about six miles below, a few days afterward. A trifling scratch was upon the abdomen, but on the forehead was a large, extravasated wound, which, according to medical testimony, must have been inflicted upon the victim while he was still alive. On the following day Harriet was accused of the crime of murder and arrested—also a stalwart Cornishman, her "fighting-man," so-called. In those days gold dust, instead of stamped money, was the medium of exchange. Everybody who was in business kept a pair of scales

to weigh and determine the value of gold dust. Harriet had such a pair of scales ; and there was a large iron weight used with it, which, the prosecution said, was the instrument of the death of Pat Berry.

On the trial of the woman and her fellow, John R. McConnell, a bright but eccentric and erratic leader of our bar, who died in Colorado in 1879, prosecuted, and Lorenzo Sawyer defended. Justice John Anderson, brother of one of the earliest and ablest of California lawyers, and who, thirty years later was a Justice of the Peace in the same old town, heard the preliminary examination of the case. This consumed two or three days. It was established by the prosecution that Berry had money upon his person when he visited Nevada City on that fatal night. His movements were traced ; the time and manner of the recovery of his body were shown ; that the wound on his head was given in life was made clear, and it was also proved that this wound was inflicted with a round, blunt weapon.

The theory of the prosecution was that Berry had been murdered for his money in the brothel of Harriet by the latter and her "friend," then stripped of his clothing, which, as stated, was all new, and thrown into the convenient creek at the rear of the house.

Against so plausible a theory Lorenzo Sawyer had to contend. It is to be regretted, from a strictly legal standpoint, that Justice Anderson did not decide this case as it was at first submitted to him. It is to be regretted that the highest tribunal of our country had not been called upon to pass on this very case. It would have furnished a fine test of the certainty of human judgment. It would be decidedly interesting to know what would have been the issue of that trial, if the evidence mentioned below had not been elicited.

Judge Sawyer's theory for the defense was that Berry had started about midnight from the woman's house for home ; that he was heavy with alcohol when he set forth upon his dark, homeward journey ; that in crossing the creek he fell off the narrow log ; and that, in falling, his head struck upon a rock—there were plenty of rocks in that vicinity—and thence received the wound from which he died some minutes later, thus accounting for the extravasation of blood. The missing clothes were a puzzler, but the counsel sought to account for their absence by invoking certain principles of natural philosophy as to the action of the roaring torrent of water, rocks, trees, etc., in the bed of the stream.

Justice John Anderson, did not know what to do with the case as submitted to him. He took it under advisement for a week.

It so happened, that, during the week, at midday in view of several witnesses, two men started across the creek aforesaid—to walk the famous log in company. In the middle of the riotous stream one of them pitched off. *He* was never seen alive. His companion and others—for this was in the daytime—ran down the banks of the creek, and, some miles below, found his

dead body in the very same eddy in which Pat Berry's body had been found a few days before. An extravasated wound was found upon the head, just like that which was on the head of Pat Berry. There were no other wounds on the body, but all the clothes were stripped off except the undershirt, which, turned inside out, and drawn over his head, was clasped around the wrist, and held by a single button.

This last mishap coming to Judge Sawyer's knowledge, he moved the court to reopen the case. It was so ordered, and new evidence of the circumstances just related being submitted, the defendants were discharged.

When informed of the circumstances of the second death, "Harriet" lifted her hands and eyes towards heaven and in tones and manner intensely tragic, but with manifest sincerity, exclaimed: "God himself has interposed to save an innocent woman!"

There was tried, in 1851, at Rough and Ready, Nevada county, before E. W. Roberts, Justice of the Peace (since a County Judge and State Senator) a case which involved the possession of a mining claim on Industry Bar, valued at \$100,000. It was the case of the period. The parties to the suit were many and prominent, and fully supplied with the sinews of war. Lorenzo Sawyer was leading counsel for the plaintiffs. It was agreed that the hotel bill, wines, cigars, tobacco, etc., for both sides, should go into the bill of costs in the case, and be paid by the losing party. After a three days' trial the jury disagreed. A second trial, lasting ten days, resulted in a victory for Judge Sawyer's clients. The bill of costs, recovered against and paid by the defendants, was \$1,992. The hotel bills were probably twice as much more.

Among Judge Sawyer's leading cases are *Taylor vs. Hargous* (4 Cal., 268), and *Eddy vs. Simpson* (3 Cal., 251). These cases are "leading," not only in the sense that they are important, but that they first established, in this State, the principles therein laid down. In *Eddy vs. Simpson*, the plaintiffs sued to recover damages for interference with their water rights. One Artemas Rogers was the heavy man of the defendants. He was a very active, positive character, and anticipating the suit, he visited Sawyer at his office to retain him. Sawyer had prevailed against Artemas in a hot legal conflict a few months before, and he remembered it. He now wanted his help. Having stated his case, he asked:

"Can you win it?"

"I don't think I can," said Sawyer.

"By —, sir; you are not the man for me, then," exclaimed Rogers.

"I don't think I am," said Sawyer, quietly.

Rogers then narrated a chapter from his experience in Sawyer's native State. He said he had once consulted a lawyer in an important cause in that State, who did not think he could win. He thereupon declined to retain him, employed another lawyer, who thought he could win, and he did.

"I had rather be against you than for you in this matter," said Sawyer. "As you do not want me, you will not object if I accept employment from the other side. I know they will call on me."

"Not at all," replied Rogers. "If I do not employ a lawyer, I will not keep him out of the case. Do what you can for them, and charge a d— big fee. But you can't win."

Within an hour Sawyer was retained on the other side. The trial soon came off before the District Court. Barbour, the Judge, having recently been elected was disqualified in many cases, and Judge A. C. Monson, of Sacramento, who afterwards became one of the richest men in the State, presided at that term. Judge Monson instructed the jury as requested by Sawyer. There was a disagreement, only one obstinate juror favoring the Rogers party. A change of venue was had to Marysville and the case was tried again before Judge W. T. Barbour. John R. McConnell conducted the plaintiff's case, Sawyer being unable for various reasons to attend. Judge Barbour refused to give the instructions which Judge Monson had given on the first trial but gave instructions directly the reverse, and a jury brought in a verdict for the defendants. Then Artemas Rogers took particular pains to wait upon Sawyer and announce the result.

"You laugh too early," said Sawyer; "I'll show my hand in the Supreme Court. We will meet again at Phillippi."

Rogers afterwards discovered that he had laughed too soon. The plaintiffs were the men who laughed last and who laughed best. The Supreme Court reversed the judgment, in a very brief decision written by Justice Wells, one of the very few opinions penned by that Justice.

In the case of Taylor vs. Hargous, which was commenced after Judge Sawyer's removal to San Francisco, and which he won both in the old Superior Court and on appeal, the Supreme Court declared that when a homestead has been duly selected, and occupied as a residence, and the husband executes thereafter a deed of the property and removes with his wife therefrom, but the wife does not join in signing the deed, the homestead is not abandoned and the deed is void. Justice Heydenfeldt, who wrote the opinion, said: "If the husband can sell at pleasure, and remove to another place, without the consent or approbation of the wife, then the design of the statute to protect her against the improvidence, misfortunes or misconduct of the husband, would be totally nugatory."

While in Nevada City, Judge Sawyer practiced law in partnership, first with E. F. W. Ellis and afterwards with Judge Stanton Buckner. It was announced in a local print recently that a certain lawyer was the author of the Sole Trader Act. It was an error. E. F. W. Ellis wrote and secured the passage of that measure, its necessity being suggested to him by the circum-

stances of a certain female friend of his in Nevada City. It is one of the wisest acts on our statute books, although it has often been made the cover of gross fraud.

Ellis was in the lower house of the California Legislature in 1852. He was an able lawyer; but, like Baker, he was restive in harness, and thirsted for glory. He went back to his State and Baker's State, and, during the war, was Colonel of the fifteenth Illinois regiment, one of the earliest to volunteer on the first call. He fell in a charge at Shiloh. "Catch me, boys!" were his last words. While criticising the evidence of a witness, on one occasion, in a Nevada City court, Ellis glanced at the subject of his remarks just in time to see him draw a pistol. Ellis drew a long knife, which he carried, and leaping over the bar table, rushed upon his enemy, who at once fled into the street. Ellis then returned and concluded his argument. Judge Stanton Buckner was from Missouri, to which State he returned. Sargent, in his hasty history of the Nevada bar, tells this of Buckner: To demur was his strong forte. He was a kind and gentlemanly man, but disagreeable to practice with, by reason of his prolixity and slowness. In arguing a petty criminal case one day before Justice Endicott, who was very thin and bony, and who had a very hard seat to sit upon, Buckner, after a long talk, assumed a certain attitude peculiar to him, and which indicated that he had a great deal more to say. "I will now show your honor," he said, "that a man is presumed to be innocent until he is proved guilty." "The court admits that," said Endicott, interrupting; "the court is with you in that; but there is no presumption that the court's bottom is made of cast-iron."

In the autumn of 1853, Judge Sawyer removed to San Francisco, and he has ever since resided there. During his short stay there in 1851, he was in partnership with Roderick N. Morrison, then County Judge and Presiding Judge of the Court of Session, and Frank M. Pixley. Judge Morrison was Mr. Pixley's uncle. His name is upon many pages of our earlier Supreme Court Reports.

San Francisco has always been a very easy city to get acquainted with. At least a hundred men have won substantial honors there before they were well acquainted with a hundred men in the city. Judge Sawyer had not been there a year when he was elected City Attorney. Litigation was very heavy at that time; the city, too, was involved in many suits. During his term of office, no judgment was obtained against the city, and of the judgments which were rendered in her favor only one—Hazen vs. San Francisco—was reversed on appeal. In the case of the San Francisco Gas Company vs. the City of San Francisco (9 Cal. 433), Judge Sawyer, then having passed out of the service of the city, appeared against the city. He conducted the plaintiff's case in the District Court, and, on appeal, made an argument and

prepared an elaborate brief. The final decision in this case, which was in his favor, overturned principles upon which many judgments in favor of the city rested.

In 1855 he was a candidate before the State Convention of his party for the nomination of Supreme Judge, and was defeated by six votes. At that election a nomination was equivalent to an election. In the spring of 1861 he formed a partnership with General Charles H. S. Williams, which continued until his appointment to the bench of the Twelfth District Court.

This firm established a branch office at Virginia City, Nevada, where Judge Sawyer was temporarily engaged, when, in May, 1862, Governor Stanford appointed him Judge of the Twelfth District Court, Judge Alexander Campbell having resigned. Crossing the snow-wrapped mountains on horseback, he reached San Francisco on Saturday night, and on the next Monday, June 2, 1862, he opened court at Redwood in San Mateo County—the counties of San Francisco and San Mateo comprising the Twelfth Judicial District. He was elected at the next election for a full term without opposition, both parties having put him in nomination. Under our reorganized judicial system, pursuant to our second State Constitution, in 1863, Judge Sawyer was elected on the Republican ticket a Justice of the Supreme Court. On casting lots, as required by the constitution, he drew the middle term, six years. During the last two years of his term he was Chief Justice. In 1869, as his term as Supreme Judge was drawing to a close, Judge Sawyer was appointed by President Grant, Judge of the United States Circuit Court of the Ninth Circuit, embracing the Pacific States. The Senate confirmed the nomination without dissent, and he entered upon the office in the beginning of 1870.

At the bar and on the bench Judge Sawyer has always been distinguished for industry and honesty. He never laid claim to brilliancy or genius. He is a man of business, richly endowed with common sense, practical, prudent. Truth and duty are his watch words. In investigation he dives to the bottom and explores with rare patience and application. He always made it a habit to investigate thoroughly whatever might be the subject of his study. His staying qualities are great. The eccentric Lockwood, whose logical power was universally acknowledged, once found Sawyer opposed to him. It was the first case in which Sawyer appeared in San Francisco. Lockwood made an ingenious argument, and sat down, giving to Sawyer, whom he had never met before, a glance which said, "Who are you, I wonder?" Sawyer was well prepared, and made an argument full, forcible, conclusive. He had the right side of the case, too. When he closed, Lockwood, who had followed him closely, arose and told the court that Sawyer's argument was sound, and he felt it his duty to surrender. A few minutes afterwards Lockwood seeing Sawyer in the corridor, approached him with extended hand, and said: "I don't know who you are, or where you came from, but you laid me out as

cold as a wedge." After some further complimentary remarks, he suggested a partnership.

Judges Field, Sawyer and Hoffman, Federal Judges in California, are of one mind on the Chinese question. That is, while they might differ as to the *kind* of legislation appropriate to the subject, they agree perfectly as to *where* the power of legislation lies. They believe this undesirable immigration should be checked, but hold that all the State can do in the premises is by way of agitation and petition to Congress. In the case of Tiburcio Parrott on habeas corpus, Judge Sawyer has given his views at length.

Mr. Parrott, who was President and a Director of the Sulphur Bank Quicksilver Mining Company, a California corporation, was arrested, and held to answer before the proper State court for having employed, in the business of the corporation, certain Chinamen. He was taken on habeas corpus before Judges Sawyer and Hoffman, when elaborate arguments were made by able counsel, pro and con, on the question of the validity of the State law prohibiting the employment of Chinamen in certain cases, and of the article in our new constitution upon which that law was based. Judge Sawyer held that the constitutional and statutory provisions were in conflict with the constitution and laws of the United States, and of the Burlingame treaty between this country and China. In dealing with the question he threw out these suggestions :

Holding, as we do, that the constitutional and statutory provisions in question are void for reasons already stated, we deem it proper again to call public attention to the fact, however unpleasant it may be to the very great majority of the citizens of California, that, however undesirable, or even ultimately dangerous to our civilization, an unlimited immigration of Chinese may be, the remedy is not with the State, but with the general government. The Chinese have a perfect right, under the stipulations of the treaty, to reside in the State and enjoy all privileges, immunities and exemptions that may be enjoyed by the citizens and subjects of any other nation; and under the fourteenth amendment to the national constitution, the right to enjoy life, liberty and property, and the equal protection of the laws, in the same degree and to the same extent as these rights are enjoyed by our own citizens. To persist in State legislation in direct violation of treaty stipulations and of the constitution of the United States, and to endeavor to enforce such void legislation, is to waste efforts in a barren field, which, if expended in the proper direction, might be productive of valuable fruit; and, besides, it is little short of incipient rebellion."

Unlike his brother Hoffman, Judge Sawyer sometimes makes public addresses. At the fifth annual meeting of the Associated Alumni of the Pacific coast, held in Oakland, June 3, 1868, the Judge responded to the toast, "The Judiciary" at some length. He was then the Chief Justice of our State Supreme Court. In this speech he said, among many quotable passages :

The bar is the fountain from which the judiciary is to be continually replenished; and, as it is a well established principle in natural philosophy, that the stream can never

rise higher than the fountain which supplies it, so the bench can never rise far above the level of the bar.

I cannot believe it possible that one endowed with fair natural abilities, a sound and unbiased judgment, who has cultivated his talents with diligence and care, and become well grounded in the ethics of the law—who has risen to a true conception of the magnitude, and become thoroughly penetrated with the vast importance of the mission of the judiciary in its relation to the well-being of man, and to the stability of good government—can make a *bad* judge. Such a man may not attain the summit of judicial greatness; he may not be a brilliant luminary, shedding his light afar, imparting alimant and warmth to nourish and promote the administration of justice in distant lands; but he cannot fail to be a worthy judge and useful in the immediate sphere of his influence; he cannot fail to contribute, in some degree, to the perpetuity of free institutions.

In 1879, Judge Sawyer was the Grand Orator of the Masonic Order in California, and on October 13th of that year he delivered the annual oration before the Grand Lodge of this State. It was mainly historical, commencing in the misty dawn of architecture, and tracing the course of operative Masonry through many centuries, pointing the while to the many monumental splendors that yet attest its handiwork, down to the time, when, reorganized upon the speculative basis, and using its implements as symbols only, the craft entered the field of charity and free inquiry. Then, following his enlarged theme down to the present day, he said :

Masonry is not, and it does not profess to be, a religion, or a substitute for religion; but it inculcates a system of the purest morals, which is an essential element and necessary concomitant of all true religion. There are certain elements or principles which are universally accepted as essential to all systems of faith worthy the name of religion—such as a belief in a Supreme Being; a recognition of the moral distinction between right and wrong; the obligation to recognize and cultivate the practice of all the virtues, such as temperance, sobriety, chastity, fortitude, prudence, justice and, chief of all, charity. On these principles all must and do agree. There are other points of faith upon which the reason may and does pause, inquire, doubt: and yet it is upon these latter that zealots and enthusiasts dogmatize most confidently, dispute most furiously, and hate most implacably. It is upon these very points where we should be most distrustful of the correctness of our judgment, and most charitable towards the views of others, that man is most confident, most obstinate, most uncompromising; and it is upon these that he consigns his fellow man to the dungeon, stretches him upon the rack and burns him at the stake. Into that disputed territory Masonry does not enter. Its leading tenet, charity, forbids it—all its principles prohibit it. It accepts and plants itself upon those self-evident and universally accepted principles which lie at the foundation of all true religion and all morality, and upon the recognition and practice of which all human happiness must rest.

On March 17, 1869, at a banquet at the Brooklyn Hotel, San Francisco, at which many had gathered to commemorate, in that agreeable manner, the life and services of Ireland's patron saint, Judge Sawyer spoke for "The Judiciary of California and of the United States." The specimens of his humor in his remarks on public and social occasions are so few that it may

be well to give the following a place in this sketch. In closing his response on the occasion just alluded to, he thus sought to call out Judge Crockett, his venerable associate on the bench of the State Supreme Court:

Mr. President: I see near me my distinguished associate, Mr. Justice Crockett. The law and the Gospel are intimately connected, and it has often happened that the ministers of the one were alike the ministers of the other. In former times it not infrequently occurred that the Lord Chief Justice of England was also a bishop. Even I, myself, Mr. President, have occasionally been set down by careless observers for a priest, but my distinguished friend here never passes among strangers for anything less than a bishop. That severe and dignified gravity, which sits so gracefully on my friend here, is well calculated to produce an impression of superior sanctity. I am told, sir, that it has even become dangerous for him to venture abroad unattended; and that on his last excursion from home an expectant cavalcade of pious people, in the southern part of the State, mistaking him for your very eminent and worthy Archbishop, captured my distinguished brother, and, before he could fully comprehend the situation, whisked him off to the Mission Church. What they did with him, and how he escaped, I have never been able to learn. Perhaps he will inform you. Can you wonder at this mistake? Is it possible to contemplate that benignant countenance, and doubt that, had he lived in the year of grace 492, the mantle of St. Patrick would have fallen on his sanctified shoulders? It seems to me eminently fitting that he should be present at this festival of St. Patrick.

Judge Sawyer's latest public address was that delivered at the laying of the corner-stone of the Leland Stanford, Junior, University. The act of placing the stone was done by Senator Stanford, the founder of the University, at the site at Palo Alto, Santa Clara County, May 14, 1887. Judge Sawyer's name had led the list of the honored and worthy men whom the founder had selected as trustees of the institution, and at the organization of these gentlemen as a Board of Trustees the Judge was unanimously chosen as President of the Board. By virtue of that office he was called upon to make the address on the occasion stated. A lengthy extract from this address will fitly close this chapter.

The little grove in the suburbs of Athens, which Academus presented to the Athenians, constituted the academy in which Socrates, and Plato, and their disciples, taught their pupils philosophy, rhetoric, logic, poetry, oratory, mathematics, the fine arts and all the sciences so far as then developed. The influence emanating from those schools, notwithstanding their limited resources, has been largely felt through all succeeding ages; and it has, to this day, given direction to thought, and contributed largely to mould the characters and the civil institutions of all the peoples of Europe, and their descendants in America, and wheresoever else they may be found on the face of the earth. The people of that little Republic of Attica—the whole area of whose territory was only about two-thirds as large as that of the county of Santa Clara, in which our coming University is located—exercised a greater influence over the civilization, institution and destinies of modern nations, than any other people, however great.

The groves of Palo Alto—the Tall Tree—are much larger than "Academus' Sacred Shade." These sturdy, unbrageous oaks, with Briarean arms; these stalwart spreading laurels, and these tall eucalypti, are much grander, and more imposing, than the arbor-tendants of the grove at Athens. The soil of Palo Alto is far richer, and more productive than that of Attica; it yields as fine wheat, as delicious figs, grapes, olives and other

fruits. Its scenery is almost as grand, and awe-inspiring and quite as picturesque. Its climate is as dry, equable, and delightful. The arroyo de San Francisquito is as flush, and turbulent, in winter, if—while abundantly supplied for all purposes of the University above—as waterless in its lower reaches, in summer, as the two rivulets Cephissus and Ilissus. The transparent clearness and coloring of our sky is as “matchless” as that of Attica; and the azure dome above our heads, by day or night, is as pure and as brilliant as the “Violet Crown of Athens.” All our conditions are equally favorable to health, to physical and mental development, and to physical and mental enjoyment. Not an hour in the year is so cold as to interfere with mental or physical labor, not an hour so hot as to render one languid, indisposed to physical or mental exertion, or as to dull the edge of thought. There is not a place in our broad land, outside our own beloved State, where one can perform so much continuous physical or mental labor without weariness or irksomeness. Should the plans of the founders of the Leland Stanford, Junior, University be carried out, in accordance with their grand conceptions, with such advantages as the location and climate afford, why should not students be attracted to its portals, not only from California, but from all other States of our vast country, now containing 60,000,000 of people and even from foreign lands? What should prevent this University from becoming, in the great future, the first in this or any other land? When fully developed, who can estimate its influence for good upon the destinies of the human race?

A word to the founders of the Leland Stanford, Junior, University. It is fit that the corner-stone of this edifice should be laid on the anniversary of the birth of him, who, while yet a mere youth, first suggested the founding of a university—a suggestion upon which you have nobly acted, and to the establishment of which you have devoted so large a portion of the accumulations of a most energetic, active, and trying life. It is, eminently fit, that an institution founded and endowed on that suggestion should bear his name. The ways of Providence are inscrutable. Under Divine guidance, his special mission on earth may have been to wake and set in motion those slumbering sentiments and moral forces which have so grandly responded to the impetus given, by devoting so large a portion of your acquisitions, and the remainder of your lives, to the realization of the objects thus suggested. If so, his mission has been nobly performed, and it is fit that both his name and the names of those who have executed his behests should be enrolled high upon the scroll of fame, and of the benefactors of the human race. You have wisely determined, during your lives, to manage and control for yourselves the funds of the foundation; to supervise and direct the arrangement and construction of the buildings, and the required adjuncts, and to superintend and give direction to the early development and workings of the new University. This is well. He who *conceives* is the one to *successfully execute*. May you remain among us, to manage and control this great work, until you shall see the institution founded by your bounty, firmly established on an immovable basis, enjoying a full measure of prosperity, affording the citizens of your adopted State the educational advantages contemplated, and dispensing to all the blessings and benign influences that ought to flow from such institutions. Long may you enjoy the satisfaction afforded by hopes fully realized—*Seri in coelum redeatis*.

Fellow-members of the Board of Trustees of the Leland Stanford, Junior, University in accepting this grand trust you have assumed the most weighty responsibilities, not only to the founders of the University, but to the children and youth of the Commonwealth, and to their posterity, in all time to come. You have assumed the guardianship of the vast inheritance, to which they have fallen heirs. In the near future, and thenceforth till time shall be no more, the duty will devolve upon us and our successors to

administer this inheritance in such manner as to accomplish its great end. I call to mind no instance where so large an estate has, at one time, been devoted by the same persons to the foundation of a single institution of a similar character—certainly, none to take effect during the lifetime of the donors. Since our organization, other lands' with ample water rights and facilities, have been added to the estate at Palo Alto especially dedicated as the *situs* and future home of the University; so that the tract now embraces about eight thousand four hundred acres. The estate at Vina, set apart for all time, as a source of revenue, embraces about fifty-five thousand acres, of which some four thousand acres are planted in vines, already in bearing, and the remainder is devoted to various other agricultural and grazing purposes. The Gridley estate, at this time devoted largely to the production of grain, embraces an area of about twenty-two thousand acres. Since our organization, at an expense of nearly \$100,000, a winery has been erected at Vina, and furnished with vats, casks and other appliances for making and handling 300,000 gallons of wine—the product of the vineyards—and other wineries and their necessary adjuncts, are now in course of construction, sufficient to afford facilities for the manufacture and handling of 1,000,000 gallons. These improvements are in pursuance of the statement, made in their address, upon the organization of the Board of Trustees, wherein the founders of the Leland Stanford, Junior, University say: "As a further assurance that the endowment will be ample to establish and maintain a University of the highest grade, we have, *by last will and testament, devised to you and your successors additional property.* We have done this as a security against the uncertainty of life, and in the hope, that, *during our lives, the full endowment may go to you.*" The aggregate of the domain thus dedicated to the founding of the University is over eighty-five thousand acres, or more than one hundred and thirty-three square miles, among the best improved and most valuable lands in the State.

The contemplation of these facts will suggest some idea of the magnitude of the responsibilities resting upon us and our successors.

CHAPTER VIII.

Solomon Heydenfeldt—An Oracle of Quiet Counsel—His Only Criminal Case—The Senatorial Contest of 1851—On the Supreme Bench and Resignation Therefrom—Other Early Supreme Judges, Hugh C. Murray, Alexander Wells, Alexander Anderson and the Patriarch, Peter H. Burnett—Reminiscences and Anecdotes of John C. Fremont, T. Butler King, John B. Weller, Wilson Flint, Henry S. Foote, Tod Robinson, Newton Booth, Solomon A. Sharp, E. D. Wheeler and Edward Norton—The Roll of Governors of California.

In another chapter has been given the incident of the lawyer who, on entering Court one day, found the McAllister family in sole but not adverse possession. They held the bench, the clerk's seat, and the bar. The lawyer withdrew softly—he didn't want to intrude. A feeling akin to his is mine, as the pensive face of another sage comes impressively into the field of view. I would not intrude into so quiet a life. The features we now see testify to serious problems solved by untiring effort, but they show lines of tenderness and sympathy that have held their place beside the imprint of absorbing thought. They speak, too, of reputation won, not in forensic encounter but in council. "Cautious, silent and laborious," as Macaulay pictured Godolphin, here is a mind that has kept tranquil amid the severest employments reaching through a long flight of time. Here is one whose lifework has been done apart from public observation. I would have to go into his office to study him. But, like Mr. Papy (in Chapter II), I don't like to intrude. However, it must not be understood that this prime character has lived and labored as a recluse. Some open views, even of him, are to be had now and then.

Solomon Heydenfeldt was born at Charleston, South Carolina, in 1816. When he was eight years old his father died, having been a teacher of ancient languages, and having been completely stripped of a considerable estate during his absence from home, by the defalcation of an agent who held his power-of-attorney. Being fortunately reared with maternal care, Solomon Heydenfeldt was sent to a college in Pennsylvania, where he studied Latin and Greek and mathematics; but he left college without graduating. Returning to Charleston he studied law in the office of the eminent advocate De Saussure, son of the great Chancellor of the Palmetto State. In the year 1837, at the age of twenty-one, he removed to Alabama, first stopping at

Montgomery, where he was admitted to the bar. He soon afterwards settled in Russell county, near the Georgia line, and practiced law in both Georgia and Alabama. In this region he married, and passed thirteen years of his life in active and successful law practice. This period of his career was, however, marked with no events of public interest. He removed to California in the spring of 1850, settling at San Francisco, and opening an office in what is now the Old City Hall. His excellent habits and business assiduity, his generous disposition, broad legal knowledge and dignified presence quickly made him a man of mark, in that era of reckless activity. He acquired a fine practice in civil business.

The only criminal case he ever had in his life was tried in the fall of 1851. For this reason it is worthy of note. Furthermore, it gives a glimpse of the loose mode of judicial procedure at that time, and presents a ludicrous instance of a jury's sense of propriety. Samuel Gallagher had killed Lewis Pollock on the night of June 22, 1851. Gallagher was tried for murder in the Fourth District Court, Delos Lake presiding, August 12, 1851. His counsel were Solomon Heydenfeldt, John B. Weller (afterwards Governor and United States Senator) and Colonel Barton. It may be said that Barton was a "Philadelphia lawyer," a beautiful speaker, a brilliant fellow, but cursed by the greatest infirmity of genius. His career was brief; he was suddenly missed at the bar, and a rumor came back that he perished at sea, a fate which some years later befell Lockwood, another legal genius with riot in his blood, who will be noticed in a subsequent chapter. The case of Gallagher was a hard one to defend. Harry Byrne, District Attorney, made a strong prosecution. Judge Heydenfeldt had the general management of the prisoner's cause, but did not address the jury. The speaking was done by Weller and Barton, the latter coming out strong and fervid. The jury disagreed. At the second trial, which occurred on November 14, 1851, Gallagher insisted that Judge Heydenfeldt should speak for him, and the Judge complied, closing the argument for the defense. The case was given to the jury at about six o'clock in the evening, the court taking a recess and Judge Heydenfeldt going into his office, which adjoined Judge Lake's courtroom, to "wait for the verdict." At nine o'clock that night the bailiff entered Judge Heydenfeldt's office and informed him that he was directed by the jury to state to him, Heydenfeldt, that they stood, firmly, seven for conviction of murder in the first degree and five for acquittal, but that if it pleased *him* (Heydenfeldt) they would agree upon a verdict of manslaughter? Judge Heydenfeldt quickly returned an expression which he afterwards had occasion many times to use while Supreme Judge, "I concur." Judge Lake was sent for, and a verdict of manslaughter was brought in. The prisoner was sentenced to three years' imprisonment and was fined \$500. Fining prisoners in capital cases, in addition to imprisonment, was quite the fashion

here in early days. The law and the courts never got so far advanced, however, as to *fine* a man and *hang* him, too. After Gallagher had been in jail—there was no State Prison then—about six months, he was pardoned by the Governor.

After the sentence of Gallagher, Judge Heydenfeldt told his friends generally of the communication between himself and the jury. Judge Lake did not learn of it until the sentence had been imposed, or, it is safe to say, there would have been a signal exhibition of judicial wrath.

The legislature which met at San Jose in January, 1851—the first session after the admission of California into the Union—was nearly evenly divided between Democrats and Whigs. On joint ballot the Democrats had a slight supremacy. When the two Houses met in convention to ballot for a United States Senator to succeed John C. Fremont, Solomon Heydenfeldt was the Democratic caucus candidate, and T. Butler King, then Collector of this port, was the Whig nominee. Fremont, it may be explained, had been elected for the short term by the legislature which met *previous* to the admission of the State, on the happening of which event (September 9, 1850) he took his seat in the United States Senate, to serve until the following March. In January, 1851, in the contest now to be noticed, he was a candidate for the succession, and received seven votes, his supporters being native Californians, (not Native Sons of the Golden West, so-called, but of Spanish and Mexican extraction). Judge Heydenfeldt, being Southern in his politics, three or four Northern Democrats, all of whom had participated in the Democratic caucus, "bolted" the caucus nomination, refusing persistently to vote for him. They voted for John W. Geary, who was afterward Governor of Pennsylvania. The legislature took no less than one hundred and forty-two ballots without an election. There was danger during the protracted struggle that Fremont's native sons would vote for King, and end the fight, in which event the Democratic bolters would not have accomplished anything of extra value, inasmuch as King was himself a proud Southron. That legislative session closed without an election of Senator. At the next session John B. Weller was chosen. But for this unexpected miscarriage, Judge Heydenfeldt would have entered the Senate in his 35th year.

His discomfiture recalls a similar fate which befell Henry S. Foote in 1856. The California legislature in that year had a large native American or Knownothing majority in the Assembly, and a majority of one in the Senate. Governor Foote, who had been Governor of Mississippi, and United States Senator from that State, was the caucus nominee for the United States Senate. But the present act of Congress governing the mode of electing Senators was not then a law, and it required the concurrence of both branches of the legislature to bring on an election. The Knownothings were not able to bring the two branches together, because

Wilson Flint, one of their party in the Senate, voted steadily with the Democrats *against* a joint convention. Flint was a hold-over Senator from San Francisco, an Independent, but had after his election joined the Knownnothings, and, in the Fall campaign of 1855, had made speeches on the stump in behalf of that party, in company with Governor Foote. The Knownnothings had intended to go into joint convention without first holding a caucus, but Flint said a caucus must be held, and one was held accordingly. Foote being nominated, Flint refused to vote for him. He was very patient under the anathemas which William I. Ferguson and others poured upon him. One reason assigned for his bolting was that in the canvass of the preceding Fall Governor Foote had written to the Knownothing State Central Committee to call Flint home, as his prosaic speeches were repelling instead of persuading the dear people. Flint heard of this letter and took his revenge. Newton Booth, elected by the Independents United States Senator in 1873, narrowly escaped the fate of Heydenfeldt and Foote. A most zealous friend of Judge Heydenfeldt in his contest for the United States Senate was Judge Stephen J. Field, then a member of the Assembly.

It was the general belief among Democrats, after the legislature adjourned, in 1851, that Judge Heydenfeldt would be the party candidate for United States Senator at the next session, one year later. But before that session opened he was nominated by the State Convention of his party for Judge of the Supreme Court. As will be readily believed, he was enthusiastically urged for this position by all the other leading men of his party who had their eyes upon the United States Senate. When the legislature next met the Democrats had a majority, and John B. Weller was sent to Washington as Fremont's successor.

Judge Heydenfeldt was elected in the Fall of 1851 a Justice of the Supreme Court, his Whig opponent being Hon. Tod Robinson, father of the well known lawyer Cornelius P. Robinson. Judge Robinson had been Judge of the Sixth Judicial District at Sacramento. He was a North Carolinian, and a lawyer of fine ability. This was the first election for Supreme Judges under the State government, the first Justices of the Supreme Court having been chosen by the legislature previous to the admission of the State. Judge Heydenfeldt succeeded Judge S. C. Hastings, and his term was for six years, commencing January 1, 1852. After only two months' service he left the State on a visit to Alabama, where he had left his family. This departure of a Supreme Judge from the State precipitated a judicial controversy, which was certain to arise sooner or later—in consequence of the inadvertence of the first constitutional convention—and which resulted in one of the most interesting adjudications to be found in all the Reports. The legislature had, a few weeks before, by a joint resolution of the two Houses, granted the judge leave of absence for six months. A month after his departure the legislature

passed an act authorizing the Governor to fill the "vacancy" by appointment; and the Governor, Bigler, immediately appointed Alexander Wells. On April 12, 1852, six days after presenting his commission, Justice Wells stated to the court that a doubt having been expressed as to the constitutionality of the act of the legislature authorizing executive appointments to supply vacancies caused by temporary absence, he would absent himself from the bench until the validity of his appointment should be adjudicated, and suggested that the Attorney General be directed to institute proceedings in the nature of a quo warranto, in order to test the question. The court directed an order to that effect to be entered on the record. The proper writ was soon afterwards issued out of the Fourth District Court, judgment was entered in favor of Justice Wells, and an appeal, upon an agreed statement in writing, was taken to the Supreme Court, where the question was argued on the part of the people by the Attorney General, who was ex-Chief Justice S. C. Hastings, while Justice Wells himself, aided by Gregory Yale and R. A. Lockwood, presented the other side. The only brief on file was Lockwood's. This brief has been retained in the new edition of the old Reports. It is a strong, logical paper—one of the very few testimonials that Lockwood left on record of his legal knowledge and acumen. The temporary retirement of Justice Wells left only two Justices on the bench—Chief Justice Murray and Justice Anderson. They disagreed in deciding the question involved. Both filed elaborate opinions, Murray holding that Justice Wells was not entitled to a seat upon the Supreme Bench, the law under which he was appointed being unconstitutional, inasmuch as the temporary absence of Judge Heydenfeldt created no vacancy in the office. Justice Anderson declared that Justice Wells' appointment was constitutional, and that he ought to take his seat upon the bench. These two early opinions are models of cogent reasoning, and engage the intelligent reader by their vigor of expression and eloquence of style; probably, in these respects, they are not eclipsed by any decision to be found in the California Reports. (Vide 2 Cal., 198.)

The concurrence of two Justices being necessary to pronounce a judgment, the Chief Justice remarked that, on the subject of resuming his seat, Justice Wells must exercise his own discretion. Justice Wells, who had brought the question into Court, "exercised his own discretion" very promptly—he took his seat on the bench. Justice Heydenfeldt returned and relieved him at the expiration of the six months' leave of absence, and immediately filed the following opinion in the case:

"When this case was first argued, opinions were delivered by the Chief Justice and Mr. Justice Anderson, and their opinions being in conflict with one another, it was necessary, in order that the case should be decided, that there should be a reargument or submission. The counsel for the respondent (Justice Wells) insists that, as the term of office in dispute has already ended, there is no necessity for a decision, and it is unusual

in such cases to make one. His position is entirely true ; but, at the same time, it is always a matter of discretion with the court, whether it will be influenced by those reasons. In this case we consider the question involved as one of vast importance, and, governed by that consideration, we have determined to decide.

"The Chief Justice has advised me that his opinion already on file will be adhered to ; that he will make no alteration, and considers it unnecessary to prepare any other. I have examined that opinion carefully and concur fully in its reasonings and conclusions. The whole subject has been fully examined by him, and he has so well demonstrated the unconstitutionality of the law under which the appointment of the respondent was made, that it would be supererogation to enter into any future discussion.

"The judgment of the court below is reversed ; and, as we are judicially notified that the term of the respondent has expired, it is, therefore, ordered that the proceedings in the district court be dismissed."

At the new election, Justice Wells was chosen by the Democracy a Supreme Judge. He served through the year 1853, and nearly all of the year following, dying October 31, 1854. His opinions were remarkably few, nearly all the decisions of the court during his term being written by Judge Murray or Judge Heydenfeldt. He was a New Yorker and a wife and daughter survived him.

On January 6, 1857, having served five years on the bench, only one year of his term remaining, Judge Heydenfeldt resigned. His opinions are contained in volumes two to seven, inclusive, of the Reports. He left the bench because the salary did not enable him to support himself and family and other dependent relatives. He has had, ever since he came to this State, a large number of persons to provide for. Resuming practice in San Francisco, he followed it with activity and success until the Test Oath Act was passed by the legislature, which required all lawyers, as a condition precedent to the right of practice in the courts in civil cases, to take and subscribe a strongly worded oath of loyalty. A few Southern lawyers, among them Judge Heydenfeldt, Gregory Yale and E. J. Pringle, could not conscientiously subscribe to this, and accordingly withdrew from the courts. Gregory Yale had the question of the constitutionality of this act adjudicated by the Supreme Court, and that tribunal decided in favor of its constitutionality (Vide 24 Cal., 242). Hon. John F. Swift had filed an objection to Mr. Yale's appearing in the Supreme Court without taking the oath. The act was repealed several years later, but by that time Judge Heydenfeldt had obtained a lucrative office business as advisory counsel to many large firms, capitalists and corporations, and he has since steadily adhered to that department of the profession. He tried a few large mining cases in the District Court of Storey county, Nevada, at a time when a test oath act, similar to the California statute, was in operation in that State, but he was not required to take the oath, the act being treated as a dead letter. He has long been counsel for large mining corporations, is learned in mining law, as well as informed in

practical mining, and owns valuable mining interests scattered over many districts.

It is to be recorded of this gentleman, that, having done a vast amount of business for women of all conditions for many years, he has never yet charged a woman a fee, whether she was rich or poor. His beneficence has been widely felt and is unfailing in many lines. He has accumulated a large fortune, but his expenses and charities are a constant and serious drain upon it. To the yellow fever fund of the last decade, he made a princely contribution, and had it credited to "cash." In person he is diminutive, with small hands and feet, dark hair and complexion, a kind eye, well shaped head and finely chiseled features. His weight is suited to his stature, he is well preserved, and possesses distinguished dignity of manner. A man universally esteemed, he yet holds himself aloof from the people. He is not a man of the masses. I once heard him on the stump addressing a multitude of the "unterrified." He was out of place. He dislikes all gloss, and glitter, and tinsel, yet is void of arrogance or affectation. He has known sorrow, borne the burden of care, and has been thrown amid all the snares of pioneer adventure, yet his have been the mood and habit of the philosopher, and he has steadily preserved his peace of soul, and the purity of his private, public and professional life.

Judge Heydenfeldt is a widower, having been twice married. The eldest of his children, an accomplished gentleman of middle age, bears the same name and dignifies the same profession.

In the Supreme Court, sitting at San Jose, in 1853, Solomon A. Sharp of San Francisco, in the midst of an argument, was given to understand by Judge Heydenfeldt that the Court did not agree with him. He continued his argument in spite of admonitions from the bench, until finally told in plain terms that the Court was confirmed in its opinion, when he ceased to struggle, remarking, "Well, it's an honest difference of opinion." "Yes," said Judge Heydenfeldt, in his polite and quiet way, "but it's a very material one." The learned counsel showed no further sign of life.

It so happened that Solomon A. Sharp, of whom I have another laughable incident to give in another chapter, in connection with Hon. E. D. Wheeler, met that gentleman for the first time on the occasion just mentioned. These names will supply me with pleasant themes, but, not following them now, the occurrence in the Supreme Court at San Jose recalls another worth the telling. A young lawyer was arguing his first demurrer. It was in the old Twelfth District Court, and Hon. Edward Norton, afterwards a Supreme Judge, was on the bench. An adverse decision followed the young attorney's argument; still, he would not sit down. For some minutes he wrestled with the bench as if determined to change the judicial mind. "Young man," said Judge Norton, somewhat sternly for one so kind, "do you want to quarrel with the

court." "Not at all, sir," was the quick answer. "Very well; that is right," said the Judge gently. "You might as well learn right now that it is folly for a lawyer to quarrel with the court, for in controversies of that kind the court always has the advantage." The young man thereupon accepted the situation. He always liked Norton, and followed his advice.

Justice Alexander Anderson, who has been referred to, was an able jurist, who had, before coming to California, represented Tennessee in the United States Senate. Another Alexander Anderson, a Virginian, was once a bright light of the bar in northern California. He arrived here in May, 1854, and only seven months later, in his forty-sixth year, perished, with a large number of victims, at the most terrible boiler explosion that has ever occurred in this State—that of the steamboat Pearl, at Sacramento. His law business had called him to the Supreme Court at the Capital. His brother, John Anderson, is a lawyer at Nevada City.

The youngest Justice and the youngest Chief-Justice of all who have ever sat upon our Supreme bench, was Hugh C. Murray. Born in St. Louis, Missouri, April 22, 1825, of Scotch extraction, he was reared at Alton, Illinois, where he received a limited education and read law in a lawyer's office. When twenty-one he joined the army, and served during the Mexican war as lieutenant in the Fourteenth Regular Infantry. After that war he returned home and was admitted to the bar, but at once set out for California. Going to Panama by steamer, then, unable to get a better passage, he took a sailing vessel for San Francisco. The sailer proving intolerably slow he got off with others at Cape St. Lucas and walked the long distance thence to his destination, which he reached in September, 1849. He at once commenced the practice of law. Quite soon he was very busy, but, in a few months, the legislature elected him one of the associate justices of the Superior Court of the city of San Francisco, a court that after dispensing justice for a few years, was itself dispensed with by act of law. Murray had brought with him from the east no fame or influence or means, but on the bench of the old Superior Court he displayed so broad a knowledge of law and such superior qualities as a Judge that his appointment to the Supreme bench by Gov. McDougal in October, 1851, in place of Nathaniel Bennett, resigned, was a fulfillment of the hearty wish of the bar. He became Chief Justice upon the resignation of Hon. H. A. Lyons in 1852 and was elected his own successor by the Democracy. In 1855 he was re-elected Chief Justice by the Native American party. He died of consumption, in Sacramento, while still Chief Justice, on September 18, 1857. He had reached that high station at the age of twenty-eight, having become an Associate Justice two years earlier. Murray possessed a patient and powerful mind, capable of the severest investigation. Judge W. T. Wallace, who was Attorney-General when Murray died, declared

that the latter was gifted with an intellect that could grasp the mightiest subject; an analysis that solved, as if by intuition, the most intricate legal problems. His associate on the Supreme bench, who succeeded him as Chief Justice, testified to his quick perception, his moral courage, his justness, his frankness and fidelity, and declared that his loss was irreparable. He was, withal, a dignified and impressive speaker on the stump. In his day candidates for the bench were not exempted from the custom of active, open electioneering in behalf of their party and themselves. I heard Murray on the stump at Sacramento in 1855. His utterance was distinct, deliberate; his voice strong and very agreeable to the ear and he wore an easy dignity that seemed to reconcile his candidacy to his surroundings. He was then speaking for the new American party then about to sweep the State. "Fellow citizens," he said, "the Whig party is dead, and has been dead for ages; and the Democratic party, if not dead, is in the last throes of expiring agony." This sounded very well, indeed, and the "agony" part was given in a way that evoked loud laughter. But I felt like calling on the ermined orator to explain. His words, rolled out so grandly, were neither true of the one party, which wasn't quite dead then, nor of the other, which isn't dead yet.

Judge Murray's most elaborate opinion was his last—that in *Welch vs. Sullivan*, reported after his death, in 8 Cal., 155. Judges Terry and Burnett, who concurred in the judgment, slightly modified it at the next term—see 8 Cal., 511.

"Can you tell me who is that elderly man in the party opposite?"

"Ah, yes. And my answer will be a surprise."

We were having an after-dinner chat in the parlor of a city hotel—my friend being a distinguished man of affairs from the East. The "elderly man in the party opposite" had been talking with some gentlemen for quite a while, all standing by an open fire, and, by his tranquil bearing and benevolent aspect, had attracted the attention of the stranger.

"Well, tell me who he is?" I was asked again.

"That is Peter H. Burnett, the first Governor of the State of California," was the reply.

"Indeed! Let's see—how long has California been a State?"

"We were admitted in '50—September 9th."

"A long time ago," mused my friend, "and there stands your first Governor!"

"Yes. Did you ever see a better preserved man? He is eighty years of age, full of years and full of honors. He has also been a successful lawyer and a Supreme Judge."

"What can you tell me of him?"

"A great deal. If you can spare the time I will promise to interest you." "Go on," he said, and I proceeded leisurely.

"I have to speak of a man who has been pre-eminently the architect of his own fortune, and who enjoys a spotless fame. The State has had sixteen Governors. These have been, naming them, not in the order of merit, but according to their periods, Peter H. Burnett (whom you are now observing) John McDougal (with one 'l,' mind you), John Bigler, J. Neely Johnson, John B. Weller, Milton S. Latham, John G. Downey, Leland Stanford, Frederick F. Low, Henry H. Haight, Newton Booth, Romualdo Pacheco, William Irwin, George C. Perkins, George Stoneman and Washington Bartlett. The list, on the whole, is creditable to a young commonwealth of heterogeneous elements, and shows two or three strong and well equipped intellects. McDougal——"

"I knew him," interrupted my friend. "Where?" "In Washington." "Not so, dear sir; you confound Governor McDougal with the accomplished Senator. Didn't I tell you to mark the single 'l'?" McDougal, Downey and Pacheco were elected Lieutenant-Governors, and filled out the vacated places of Burnett, Latham and Booth. Governor Burnett was the only one who ever stepped voluntarily from that high post to private life. Latham, after an incumbency of ten days, was accredited by the legislature to serve out the remainder of the senatorial term, made vacant by the tragic death of David C. Broderick. He had lately beaten the then Governor, John B. Weller, for the Democratic nomination for Governor, and now again prevailed against him in the short, sharp fight for Broderick's vacant seat. Pacheco became Governor when Booth went to the Senate for a full term, after having been Governor for two years."

"Let me ask," my friend inquired, "the politics of these men?"

"Governors Burnett, McDougal, Bigler, Weller, Latham, Downey, Haight, Irwin, Stoneman and Bartlett were put in office by the Democratic party; Stanford, Low, Booth, Pacheco and Perkins by the Republicans, and Johnson by the Americans, or Knownothings.

"The patriarch standing there has always been cautious, reflectives laborious, and in morals stainless. His age I have told you. The majority of the restless, chafing spirits who helped to make politics in our early days an excitable and perilous pursuit, were from the Southern States. As if in compensation, it would appear, Providence gave the State in the person of it, first pilot, a Southern man of pacific soul, who through business vicissitudes, party strife and social upheavals, ever kept the even tenor of his way.

"Governor Burnett is a native of Tennessee. His father was a farmer and carpenter. The name for generations had been Burnet; the Governor was the first of the family to add a t, and all his brothers followed suit. His motive was to make the name more complete and emphatic. In youth the

precepts of one of his ancestors were imbedded in his moral being, namely: 'Pay your honest debts; never disgrace the family; help your honest and industrious kin.' His early manhood was spent in Missouri, chiefly in mercantile pursuits, in which he failed and which involved him in large indebtedness. That he might be able to cancel his obligations and restore his wife to health, he looked to the new Northwest as far back as 1843, in which year he took his wife and six children in ox teams to Oregon when the right to that territory was disputed by the United States and Great Britain. He lived in Oregon five years, aided in establishing the provisional government and cultivated land. He came to California in 1848, and after working in the northern mines for a few weeks settled at Sacramento and entered on law practice. He had been admitted to the bar in Tennessee. He became soon after his arrival the lawyer and agent of General John A. Sutter, the great landlord of Central California, and found the employment very profitable. Removing to San Francisco, where his family rejoined him, he opened a law office. His profession, his manners, his business judgment and habits of life made him speedily and favorably known. In the first Gubernatorial campaign the candidates were not nominated by regular conventions, but put forward by public meetings. Colonel J. D. Stevenson called a Democratic meeting on Portsmouth Square, and upon his nomination Peter H. Burnett was declared the Democratic nominee for Governor. Other meetings proclaimed John W. Geary (Democrat), W. S. Sherwood (Whig), John A. Sutter and W. N. Steuart (Independents). The people gave Burnett 6,716 votes, Sherwood, 3,188, Sutter 2,201, Geary 1,475, Steuart 619. Governor Burnett was inaugurated in December, 1849. Public life proved distasteful to him and he resigned in January, 1851, when the legislature was sitting at San Jose. He then resumed law practice in partnership with William T. Wallace and C. T. Ryland, who were destined to be his sons-in-law and distinguished in the history of the State. In 1852 he paid to his old business partners in Missouri the last dollar of his debts, which had aggregated \$28,740, and has never since been financially embarrassed."

"How was he as a Governor?"

"His administration was quiet and prudent. I recall nothing of striking interest which marked it. He was a business Governor. I now recollect that his last message closed with a recommendation that the law be repealed which provided that no action should be maintained for criminal conversation or seduction. He urged its entire repeal, in order, he said, that the law might throw around the chastity of our wives and daughters that protection which ought to be afforded by every civilized country. He was the first to urge the exemption of homesteads from forced sale and attachment."

"I presume he is the Nestor of your bar?"

"No; it has been many years since he was identified with our bar. He

stopped law practice in 1854 and entered on a wide course of reading. He made his first sea voyage in 1856, visiting New York City in company with his son-in-law, Mr. Ryland. He has since made two other visits to the East by sea. His last two public speeches were made in opposition to the great Vigilance Committee in 1856. In 1857 he was appointed a Supreme Judge by Governor Johnson, and filled out an unexpired part of a term, nearly two years. In 1863 he, with others, founded the Pacific Bank. For many years he was its President, resigning a year or two ago. He then laid down all business cares, and he has since led a life of strict privacy."

"Is he wealthy?"

"He has an ample fortune?"

"I judge he is entitled to it?"

"Truly so. He published in book form a few years ago the recollections of his life. In it you will find this rule laid down for the guidance of bankers and all business men. 'If a man *once* goes through insolvency or bankruptcy, or compromises with his creditors, or indulges in unreasonable expenses, he is unworthy of credit.' He says the exceptions to this rule are about one in ten. He thinks, also, that in banking the temptation to do wrong is less than in almost any other secular pursuit."

"As to his political views?"

"His father was a Whig, but the son was in boyhood made a Democrat by Duff Green's editorials. But, as he grew older, he records, in the book alluded to, and studied more deeply the science of government, he found cause to doubt the practical result of our republican theory as it now exists. He has always desired to give our theory a full and fair trial, being satisfied that so long as it can be honestly and efficiently administered, it is the best form of government for the greatest number. It is especially adapted to a young people free from extreme want, and therefore independent and virtuous. But when the population becomes dense, dependent and suffering, and for that reason more corrupt, then will come the genuine test of our existing theory; and he thinks that, without a thorough and radical amendment, it must fail; that the three principles of universal suffrage, elective officers and short terms, in their combined legitimate operation, will in due time politically demoralize any people, and that the masses will never permit a sound conservative amendment of our theory, except by revolution, which he believes will occur within the next fifty years. It may require several revolutions in succession. This he considers most probable.

"He expressed these views in 1880. In 1861, he had issued a pamphlet on the condition of the country, in which it was evident that the 'sunset of life gave him mystical lore.' He voted for Abraham Lincoln at his second election."

In turning away from this venerable, retired lawyer and banker, let me give a few passages from his book mentioned in the foregoing conversation:

If an intelligent stranger from another planet, were to visit the earth, and were the flags of all nations placed before him, he would unhesitatingly select the Stars and Stripes as the most brilliant and magnificent of them all. No one can ever look upon that flag and forget it. Besides, it is the symbol of the first great nation that ever established civil and religious liberty in its fullness and perfection. Whatever defects may exist in our theory or government can be corrected even at the expense of revolution, but the unity and integrity of the nation can never be destroyed. The day of weak, defenseless States has passed away forever. Only great Governments can succeed now or hereafter. If our country should err for a time and commit temporary injustice, we must trust her still, and patiently and lovingly wait for her returning sense of justice, as a dutiful son would for that of his father or mother. He who trusts the ultimate justice of his country will seldom be disappointed.

I never would engage in newspaper controversies or personal squabbles. If I was unjustly censured, I paid no attention to it, and gave myself no trouble about it. In this way I have mainly led a life of peace among my fellow men. I have very rarely had the sincerity of my motives called in question. The general course of the press toward me has been impartial and just. I have never claimed to be a *liberal* man, as most people construe that most indefinable term; but I have scrupulously sought to be just to all men. The character of a just man is enough for me. I esteem and reasonably desire the approbation of good men, but I love the right more. I can do without the first, but not the last.

All the close observations of a long and active life, have satisfied me beyond a doubt of the wisdom and truth of the sentiment, written some thousands of years ago, and found in the grand old Bible, "*Give me neither poverty nor riches.*"

CHAPTER IX.

Niles Searls—A Career to Animate the Young and Poor—A Start at the Bottom of the Ladder—Unloading a River Steamboat in '49—"Waiting" for an Opportunity at the Bar—On the Bench of Nevada County—Settling the Law of Mining Claims and Water Rights—A Succession of Honors—Chief Justice of the Supreme Court—Personal Notes and Pleasantries.

It was in the middle of October, 1849. The place was Sacramento. The present Chief Justice of the State of California had just found employment at unloading a river steamboat. And at that salient point the eye is first arrested in glancing along a career so eloquent of encouragement for honest youth.

He was a lawyer, even then; but very young, and had come by the Pioneer Stage Line of Turner & Allen, from St. Louis, with just money enough to see him through to the land of gold. Dr. R. H. McDonald and Louis Sloss were among his fellow-passengers. He walked along the streets of the rudely-built "City of the Plains" in as serious study as he has ever betrayed, even on the bench of justice. What was he to do! He inquired, curiously, the rental of vacant rooms, and found that \$250.00 a month was the lowest figure at which he could obtain a law office. Lacking that sum by just \$249.50 he concluded to defer to a more auspicious season resumption of professional business. Then he wandered along the river levee, until he found this "job," where he has just challenged our attention.

His pay was one dollar per hour. Three months earlier John Bigler, afterwards Governor of the State for two terms, had done the same service in the same town at *two* dollars per hour. Bigler gave better satisfaction. At the expiration of Mr. Searls' first hour the boss approached him and said: "You don't understand this business; here is your dollar for what you have done." His occupation gone, he went about the city front in pursuit of some new industry. He was struggling for life. Just then he was not thirsting for professional fame. Approaching a restaurant which bore in front the legend, "Waiter wanted," he entered. One hour thereafter he was installed. In this capacity the constant young man, forgetting his past dreams, and all unlettered as to his destiny, worked steadily away for some six months.

"Give me some pork and beans," said a strapping stalwart from the mines, as he took his seat in the restaurant one day, "and what will you

have," he asked his companion in the same breath. As they partook of their substantial meal they engaged in lively conversation. Said one of them: "If I had a lawyer worth a d——, I could win that suit." The waiter did not fail to hear this. He approached the pair as they arose, and said: "I have heard what you have been remarking about your law matters. I would like to try that case for you. I am a lawyer myself, and am *waiting* for a chance to get into business." The astonished stranger, impressed with his manner, engaged him in conversation, and the quick result was the translation of Niles Searls from the restaurant to the courtroom. He tried that case and won it, and received a fee of \$300. He had got leave of absence for a day, without acquainting his employers with the reason for his departure. The next morning he presented himself at the caravansary and announced that he desired to quit work. "What is the matter?" he was asked. "We like you very much. Anything wrong?" "On the contrary," he answered; "everything is all right, but I want to go up country." And he went, his employers throwing an old shoe after him, for luck.

This paragraph in Mr. Searls' history was not without many parallels in the lives of California pioneers. Daniel Webster Virgin, while attending the Sacramento High School, maintained himself by waiting on the table at the Casco House. He afterwards became a District Judge of Douglas County, Nevada. His fellows at the old High School will remember him, and of these are Judge John K. Alexander, Auguste Comte, Joseph M. Nougues, and other prominent lawyers. Another leading lawyer, who attained a District Judgeship in California, had worn the white apron in Sacramento. The Hon. Charles L. Scott, who so long ago represented California in Congress, and is now United States Minister to Venezuela, once kept a mush and milk stand at Campo Seco. A leading merchant, and one of the richest men living in San Francisco, once manufactured pies at a crossing of the American River, as told me by one of his customers, Dr. Washington Ayer.

With the greater part of his three hundred dollars in his pocket, Mr. Searls went to Nevada City and commenced the practice of law. Some years later when occupying a high position on the bench, and trying a case with a jury, he noticed one of the panel eyeing him intently. When the trial closed, the juror with the inquisitive eye approached him, and asked: "Judge, ain't you the feller that used to 'serve' us in Sacramento?" "I'm the man," said the Judge; and they went out and celebrated.

Judge Searls had been in Nevada city only five days when he found himself a candidate for Alcalde. Two days later the election came off. Both honors and emoluments were attached to this office. Its jurisdiction, however, was vaguely defined, though very broad. Charles Marsh, a leading citizen who had brought water into the town, warmly espoused the cause of

Judge Searls in this contest for Alcalde. But our candidate was defeated by ten votes out of several thousand cast.

In 1852 Mr. Searls was elected District Attorney of Nevada county. In 1855 he was elected, on the American or Knownothing ticket, District Judge of the Fourteenth Judicial District, comprising the counties of Sierra, Nevada and Plumas, and served a full term of six years. He was renominated by the Democrats, and was defeated by the Hon. T. B. McFarland, now an Associate Justice of the Supreme Court. In 1864 he closed his law business and went back to New York, where he followed the life of a farmer for six years. In 1870 he returned to his old mountain home in California, and resumed the practice of his profession. In 1877 he was elected to the State Senate on the Democratic ticket, and served for one session, his official term being abridged by the new constitution. A political foe to Governor Perkins, he was yet appointed by the Governor a member of the Debris Commission, and was President of the Board when the Act creating it was declared unconstitutional, in 1880.

When Judge Searls went on the bench there was a great deal of important litigation in the counties comprising his district, appertaining mainly to water rights and mining claims. The questions involved were new, and the conditions required the application of new rules and principles. It may almost be said that the law applicable to these conflicting rights, and to their peculiar properties, had to be devised and created by the judiciary. A class of titles and claims of rights existed, entirely unknown to the common law. To reconcile and adjust them required on the part of the bench more than ordinary breadth of intellect. Mere knowledge of the law, as it was written, though essential, was not enough. It was no ordinary work to administer the law, and, as it were, *make* it at the same time. There was another difficulty to overcome, which challenged a cool brain and a steady will. The bar of the counties named contained many men of strong intellect and brilliant parts, but the prior administration had been lax. Inefficiency and irregularity in practice had grown up, and it was absolutely essential to the ends of justice that this should be corrected. In all respects Judge Searls was equal to the occasion. It is claimed for him on high authority, that, while on the bench, he accomplished more than any judge in our history in settling and arranging the law relating to mining claims and water rights. He was always courteous and dignified—never tyrannical or oppressive. He always demanded the respect due his office, and gave impartial attention to all suitors.

Judge Searls was born in Albany county, New York, December 22d, 1825. His father was a farmer in easy circumstances, and of pure English extraction. His mother was a Miss Niles, of a well known family in his native county, the Niles beings of Scotch descent. Abram Searls, the father of Niles Searls, removed from New York to Prince Edward district, Canada, where

he purchased land and settled with his family. Niles Searls attended school in Canada, mainly at Wellington, in Prince Edward's county. After five years' study, his father sent him, at his own request, back to his own native county in New York, where he attended the Rennselaerville Academy for three years. He then entered the law office of O. H. Chittenden of Rennselaerville, where he remained one year preparing himself for the profession. Just at that time John W. Fowler, a noted lawyer and orator, established at Cherry Valley, New York, the State and National Law School, an institution which for many years cut a conspicuous figure in legal annals. Some of the best minds of the California bar were trained at this school. Among Mr. Searls' fellows were Hon. Chancellor Hartson, and ex-Lieutenant Governor Machin. Judge Silas W. Sanderson and the late Judge Brockway afterwards attended the same school. Mr. Searls graduated from this institution after two years' study. His old schoolmates speak of him as having been an indefatigable student and one of the brightest minds of their class. He excelled in mathematics and scientific branches of study, and was an omnivorous reader. He was admitted to the bar of the Supreme Court of the State of New York, May 2d, 1848, and went West, traveling through Kentucky, Illinois and Missouri, practicing a short time in the latter State. He is a California pioneer, as shown by the opening sentence of this chapter.

In the spring of 1885, Judge Searls was appointed by the Supreme Court one of the three Supreme Court Commissioners, under an act of the legislature then recently approved. This Commission was an auxiliary court in intent and effect, and was created on account of the accumulation of business in our highest tribunal, threatening to block its action. The Judge had labored most efficiently for two years on this Commission, when, on April 19, 1887, he accepted from Governor Bartlett the appointment of Chief Justice of the Supreme Court, made vacant by the death of Hon. Robert F. Morrison. The Governor in this instance showed the good judgment which always marked his public acts, the appointee having the general confidence of the people and the press, and being very acceptable to all the other supreme judges. His ripe experience at the bar and long identification with the judiciary of the State, added to other qualities and capabilities, peculiarly endow him for the highest seat of justice. In mind and body he gives promise of many years of efficient service in his distinguished but laborious office. *Finis coronat opus.*

The Chief Justice is a man of strong character, he has a handsome presence, and engaging manners, an unbending will, and great pertinacity in investigation; a remarkable faculty of grasping a whole case; and sees at a glance the relative bearing of each particular part. He is eloquent on occasion, ready at repartee and has won many triumphs before juries, gaining their confidence by the evident frankness and fairness of his statements. As a citizen he is

held in universal esteem, being liberal to a fault, pure in his private life, and always ready to lead any enterprise *pro bono publico*. He is a man of bright wit and broad knowledge. Like nearly every good lawyer, he has a humorous vein and a large fund of anecdotes, and likes a practical joke. He once fined Francis J. Dunn \$50 for contempt of court—the contempt being tardiness. Dunn was an able, though eccentric and dissipated man, of whom many good things are said. “I did not know I was late, your honor,” said Dunn. “I have no watch, and I will never be able to get one if I have to pay the fines your honor imposes upon me.” (He had been fined before). Then, after a little reflection, Dunn said, “Will your honor lend me \$50 to pay this last fine?” “Mr. Clerk,” said Judge Searls, “remit that fine. The State can afford to lose it better than I can.” And the fine was remitted.

He was in the East just at the close of the war, and visited “Dixie” with a party of friends, including the late George A. Lancaster and the late Asa D. Nudd. At one town which they reached on Sunday they visited a colored Sabbath School. Lancaster introduced the Judge as a clergyman, and he was invited to take charge of the school for that occasion. He accepted the situation, and, it is said, acquitted himself with distinguished credit.

Judge Searls married, in his native county in 1853, Miss Mary C. Niles, sister of his last law partner, ex-Supreme Judge Niles. He has two children, sons, one of them a lawyer, lately associated with him professionally, and the other a mechanical engineer.

CHAPTER X.

A. P. Catlin, of Sacramento—An Historical Chapter—The Squatter Riots of 1854—Broderick's Struggle for the United States Senate—The Peck-Palmer Bribery Trial—Memorable Meeting Between E. D. Baker and C. H. S. Williams—Locating the State Capital—Attempts To Extend the San Francisco City Front—The First Vigilance Committee of the Bay City—Trial of "The Hounds"—Impeachment of State Treasurer Bates—Long Litigation over the Town of Folsom—Allusions to Prominent Men of Early Times.

All of the eminent men thus far observed belonged originally to the bar of our metropolis, or early became identified therewith, excepting the present Chief Justice. In looking out again, from the central point of view, over the array of leadership in the interior, there rises to the mind, at the capital city, a notable figure that will repay the most intelligent study. The subject of unqualified respect throughout the State his fame is yet peculiarly associated with Sacramento, to which he has held even when she sank under floods or disappeared in tempests of fire. Author, too, of the act locating the seat of government permanently, after its long unrest, the fancy, by a little indulgence, sees him pictured to coming times as standing under the dome of the Capitol, and upholding its historic arches on Atlantean shoulders.

A. P. Catlin was born at Tivoli, Dutchess County, New York, in January, 1823. Thomas Catlin, first of the name known in America, came from the county of Kent, England, in 1643, and settled in Hartford, Connecticut. His posterity for five generations, including Pierce Catlin, father of A. P., were born in Connecticut. David, A. P. Catlin's grandfather, was a captain in the Connecticut militia, and was in the action in which General Wooster was killed—the attack by the British General, Tryon, on the town of Danbury. He died at the age of ninety-three. His son, Pierce Catlin, was a school teacher, then a wagonmaker, afterwards a farmer. He died aged eighty-four. A. P. Catlin's ancestors on his mother's side were Germans. The first of the line came to America and settled in Dutchess County, New York, April, A. D. 1700.

A. P. Catlin graduated at Kingston Academy, Ulster County, New York in 1840. He studied law in Kingston, three and a half years, in the office of Forsyth & Linderman, both of whom were distinguished lawyers of eastern New York, and was admitted to the bar of the Supreme Court of New York

at Albany (Nelson, Cowen and Bronson, Justices), on the 12th of January, 1844; and to the old Court of Chancery as a solicitor by Walworth, Chancellor, on the 16th of the same month. He practiced about four years in Ulster County, where he frequently met as antagonists, in forensic battle, John Currey, afterwards Chief Justice of our Supreme Court; William Fullerton, the Judge Fullerton afterwards distinguished as counsel in the Beecher trial; T. R. Westbrook, later one of the Judges of the Supreme Court of New York; and other young attorneys who afterwards made their mark in the Empire State. In the spring of 1848 he removed to the City of New York, and formed a partnership with George Catlin. Before leaving Ulster County he had successfully conducted an important litigation, in which he had for his client the Spanish Consul, resident in the City of New York, who had been sued in the State courts of Ulster County upon a contract liability. Mr. Catlin pleaded the consular privilege of answering only in a federal court, a privilege which was vigorously disputed, and he succeeded in ousting the State court of jurisdiction.

On the 8th of January, 1849, he sailed in the brig David Henshaw for San Francisco, arriving in that port on the 8th of the following July. Here, in the brief sojourn of a month, he witnessed the organization of the first Vigilance Committee, the formation of the revolutionary court that tried the "Hounds," their trial, and concurrent scenes. That court was constituted of Dr. William M. Gwin, James T. Ward, and Thaddeus M. Leavenworth. The first two were elected by the acclamation of a crowd of citizens on Portsmouth Square, to sit with Leavenworth, who was the Alcalde and the only lawful authority. The Alcalde at first refused to recognize his associates in any capacity other than as mere *amici curiæ*. Dr. Gwin declined to act unless he and his associate, Ward, were acknowledged as of equal authority with the Alcalde. The latter functionary was compelled, by the open threats of the excited citizens, who suspected him of partiality to the "Hounds," to yield the point. Some ten or twelve of the defendants were convicted and sentenced to imprisonment for various terms, the highest being fourteen years. But there was no prison. The excitement of which the court was born had passed away before the trials were concluded, and this tribunal was powerless to enforce the execution of its decrees. The prisoners were, however, delivered to the commander of the United States sloop of war Warren, and were soon after discharged, as it was understood, by order of the Secretary of the Navy. T. M. Leavenworth, after whom Leavenworth street was named, had formerly been an Episcopal clergyman at Staten Island, New York. He came to California as Chaplain of Stevenson's Regiment, and had been appointed by competent authority, Alcalde of San Francisco. Catlin was personally acquainted with him, through letters of introduction from some of his old parishioners, and sympathized with him in the severe ordeal to which

he was subjected by the Vigilance Committee; and endeavored to support his authority. The Alcalde desired to appoint Mr. Catlin counsel to defend the "Hounds," and offered to pay for the service by grants of city lots, which he had unquestioned power to make. Catlin could not accept the employment, for the reason that at this time he was under a double contract with the master of the ship David Henshaw, and five of her sailors—first, that the sailors would work for the captain thirty days in putting his cargo ashore, and next, to take the sailors with him (Catlin) to the mines, and share with them in his proposed mining adventure, for which he had brought from New York a costly outfit of machinery. Hall McAllister conducted the prosecution and Judge Barry the defense of the prisoners.

Mr. Catlin reached the mines in the vicinity of Mormon Island, Sacramento County, in August, 1849. He passed the following winter there, engaged in mining and practicing law before Duncan, the Alcalde of that district. Upon his arrival there he found that office held by a son of Esek Cowen, who was formerly one of the Justices of the Supreme Court of New York, and who wrote a useful treatise upon Justices' Courts. Upon the resignation of young Cowen, Duncan was appointed by Judge Thomas, Judge of First Instance, and his authority was recognized as absolute in all cases by a large population, and over an extended territory without limit of jurisdiction as to value or character of property involved, until the legislature in April, 1850, provided for justices of the peace. Returning to Sacramento in May, 1850, Mr. Catlin there met John Currey. They immediately formed a co-partnership, and opened a law office. Among the leaders of the Sacramento bar at this time were Murray Morrison, E. J. C. Kewen, Colonel Zabriskie, Jos. W. Winans, J. Neely Johnson, John B. Weller, M. S. Latham, John H. McKune and Philip L. Edwards. This partnership continued for a short time. The climate prostrated Mr. Currey, who soon retired to San Francisco.

Mr. Catlin witnessed the squatter riots, and the conflict on the corner of Fourth and J streets, between the authorities of Sacramento City and the rioters, on the fourteenth of August, 1850. On that day Woodland, the City Assessor, was killed, and Biglow, the Mayor, was mortally wounded. Others were killed in the same fight, among them Maloney, the leader of the squatters. Dr. Charles Robinson, who afterwards became Governor of Kansas, was severely wounded. On the following day, in a continuation of the same fight, a few miles out of the city, McKinney, the Sheriff of the county, and several others were killed. (The widow of McKinney afterwards married Mr. Wright, a hardware merchant of Marysville. Mr. John A. Paxton, the banker, married her sister). The excitement was great, and the city authorities, fearing an assault from the friends of the rioters, who were supposed to be gathering in the country and mining sections for that purpose, made their situation known to the authorities at San Francisco. John W. Geary, then

Mayor of the last named city, (afterwards Governor of Pennsylvania, and Major General in the Union army) came to their assistance with two San Francisco military companies, one of them commanded by the late Captain W. D. M. Howard. It soon proved that the assistance was not needed, and that rumors operating upon an excited and terrified populace had greatly exaggerated the supposed dangers.

Late in the Fall of 1850 Mr. Catlin closed his law office in Sacramento, and returned to Mormon Island, being employed to settle the affairs of the Connecticut Mining and Trading Company, which was the successor in interest of the famous store and business of Samuel Brannan, and to attend to the mining interests which he had acquired in that vicinity in the summer of 1849, and winter of '49-'50. Just then Wm. L. Goggin, the agent of the Post-office Department for this coast, visited Mormon Island for the purpose of establishing a Postoffice there. He requested Mr. Catlin to furnish a name for the office. Mr. Catlin had already formed the "Natoma" Mining Company, adopting that name from the Indian dialect, it signifying "clear water," and a tradition that such had been, among the Indians, the name by which that locality had formerly been known. Goggin adopted the name, and that section of Sacramento county was officially named "Natoma township."

Mr. Catlin was always a Whig, as long as there was a remnant of the old party. He was placed on the Whig ticket as a nominee for the Assembly in 1851, and was with the whole ticket defeated at the September election, when Pierson B. Reading was defeated by John Bigler for Governor. In the following year he was nominated for State Senator, and was elected at the presidential election, when General Scott was the Whig candidate for President. He served in that capacity for two years, the sessions of the legislature being held at Vallejo, Benicia and Sacramento. During those two years he rendered important service in many matters of legislation. He introduced a homestead bill, the same as that which afterwards became law, but which was then, after a hot contest, defeated by the casting vote of the Lieutenant Governor. His own constituents of Sacramento were faithfully served in much needed local legislation, and in the important matter of the State Capital. He was the author of the law, making Sacramento the permanent seat of government of the State.

The final anchorage of this ark of the political covenant, which had floated from San Jose, its original seat, to Vallejo, thence to Sacramento, back to San Jose, again to Vallejo, thence to Benicia, where it was found by the members elect on the first of January, 1854, was the result of the determination and sagacity of the Sacramento Senator. During the session of 1853, the early part of which was spent at Vallejo, and the remainder at Benicia, he made no open, decided movement in behalf of Sacramento. The time was unpropitious for many reasons, among which was the fact that

Sacramento during the most of that winter, was submerged by a flood. The Benicians procured the passage of a bill by a two-thirds vote, making Benicia the seat of government. They entertained the mistaken notion, that it could not be removed by less than the same vote. This idea arose from the fact that the constitution had fixed the seat of government at San Jose, and provided that it should so remain until removed from that place by a two-thirds vote of the legislature. In the first removal to Vallejo this vote had been obtained; but it was always contended, by the San Joseans, until the question, years afterward, was decided against them by the Supreme Court, that this constitutional requisition of a two-thirds vote to remove from San Jose, had not been satisfied, because the passage of the removal act had been procured by means of a contract on the part of General Vallejo to provide the State with a suitable capitol building, which contract had not been performed. By some curious process of reasoning, the Benicians appropriated this idea to their own use and benefit, and relied upon it with seeming composure. At the opening of the session in January, 1854, a strong Sacramento lobby, furnished liberally with the means of paying expenses by an appropriation by the City Council, went to Benicia, confident of their ability to procure the passage of a resolution to hold the session at Sacramento. They did not think it possible to procure the passage of an act *fixing* the capital at Sacramento while the legislature was in session at Benicia, but were of the belief that it was necessary first to get the legislature to hold the session at Sacramento, and that during such session an act making Sacramento the permanent seat of government could be passed. Senator Catlin, upon whom they mainly relied, did not concur in this opinion, and advised against the temporary expedient proposed. He urged his constituents to labor for the passage of a bill fixing the seat of government at Sacramento after the close of the pending session. In this he was overruled. The Sacramentans were twice beaten during the month of January in vigorous efforts—first by a concurrent resolution, and next by a joint resolution to adjourn and meet at Sacramento. They retired from the field, and went home thoroughly disheartened, and with little hope of ever seeing their city made the capital of the State. Catlin requested them not to return; informed them that he intended in due time to make another effort, in which their aid was not needed, and which their presence would thwart, by causing extra activity and exertion on the part of the Benicia lobby, which had been too powerful for them in the contests which had just ended.

Early in February Mr. Catlin introduced the bill for the act, which is now the law, and which is found in the statute of 1854, page 21, of which the first section reads: "*From and after one day after passage of this act the permanent seat of government of this State shall be, and the same is hereby*

located at, the City of Sacramento, in the County of Sacramento." The second section repealed all other acts establishing the seat of government. The peculiar provision providing for the *time* when the act should take effect, unlike any ever seen in a statute, was the Senator's invention, to avoid a difficulty which had before been experienced from parliamentary motions extending the time for the final vote beyond the day named for removal. Upon the introduction of the bill, Charles H. Bryan, Senator from Yuba, arose and moved that the bill be rejected—a motion known in parliamentary law, though rarely used. He said "it was an insult to the Senate for the Senator from Sacramento to bring that measure again before the legislature after it had been twice defeated. In reply our friend reminded him that it was the first time that a bill for an act had been offered, and the first time that the full merits of the question of *permanently* locating the seat of government had been presented. The measure was assailed with more violence than argument. It is sufficient to say that, after encountering some narrow escapes in its progress to a third reading, the bill became a law on the 25th of February. It received the signature of Governor Bigler the moment it was delivered to him. The following day was the last the legislature could legally sit at Benicia. It merely met and adjourned, to meet at the new capital on the 1st of March, 1854. The people of Sacramento did not receive the intelligence until after the bill had passed, and were much astonished at so suddenly receiving the boon which they supposed was irrevocably lost and for which they had made a four years' struggle.

The constitutionality of the act was tested, and was affirmed by the Supreme Court. Charles H. Bryan, the Senator who had so savagely opposed the act, was then on the Supreme bench, and held that the act was constitutional.

At this session, and while the legislature was yet at Benicia, occurred one of the most remarkable trials on record, though very little record of it remains. A prolonged and determined effort was made to elect David C. Broderick, Northern Democrat, United States Senator. It was claimed by the Whigs, of whom there were seven in the Senate, and by the supporters of Dr. Gwin, Southern Democrat, that as the term for which Broderick was a candidate did not commence until after the next session of the legislature, it would be an unconstitutional act to elect at that time, and so take the election from the body to which it rightfully belonged. This argument had no weight with the supporters of Broderick, who had a large majority of friends in the Assembly, but, as it turned out, only one-half of the Senate. At that time the legislature could be called immediately into joint convention by a concurrent resolution. The struggle, therefore, was to put such a resolution through the Senate. Broderick's election would, at any time during the session, have resulted in twenty-four hours after the adoption of such a

resolution by the Senate. The forces upon this question stood so evenly divided in the Senate that Broderick lacked but one vote, and this it was impossible to obtain. The contest continued through the greater part of the session, and the utmost vigilance was required on the part of those who opposed the election. There were exceedingly few of the Senators whose firmness on either side of the question could be doubted. The position of each one of them was made known by more than one test vote. The situation was such that if any one of them had, in his own conscience, been convinced that it was his duty to change, it would have worked his political ruin to follow his conscience.

Peck, one of those who had steadily voted against going into joint convention, was Senator from Butte county; a country merchant, of little experience in public affairs. At one of the most critical periods of the senatorial contest, Senator Peck arose to a question of privilege. He charged that Joseph C. Palmer, who was the head of the most important banking institution in San Francisco, and an active friend of Broderick, had attempted to bribe him with an offer of \$5,000, to vote in favor of going into joint convention to elect a United States Senator. A resolution followed, summoning Palmer to answer for a breach of the privilege of the Senate, and ordering his arrest. A day was fixed to hear the matter. General Charles H. S. Williams, one of the ablest lawyers ever in this State, was retained as Palmer's counsel, and Colonel E. D. Baker was engaged by the friends of Peck.

It was evident that a mighty struggle was to take place when such giants took the field. Peck's statement was made on the 19th of January, and the trial was concluded on the 3d of February. A large number of witnesses were examined. Palmer escaped through a single dexterous movement of his counsel. It had been informally agreed by all the Senators who were political debaters, that they would permit the trial to proceed without interference on their part, except to vote upon questions as they arose, without debate, and that they should act the part of decorous and impartial judges. Colonel Baker, an orator of profound thought and of more elequent expression than any of his day and generation, (see Chapter I) was yet no match for General Williams in the management and conduct of a trial. When all was ready and the Senators had settled in their seats and duly put on the air of judges, Palmer was called to the bar. As the accused approached the Secretary's table, General Williams requested, in a quiet and matter-of-fact way, that he be sworn. The Secretary administered the oath, no objection coming from any quarter. Palmer immediately proceeded to relate his story, and had proceeded but a few moments, when it was clearly manifested to the sense of every one present that the act of allowing Palmer to be put on the stand as a sworn witness, was a grave oversight. But it was then too late to repair the error. Palmer swore that he met Senator Peck on the steamer at

the time stated by Peck, and that the latter had in explicit terms proposed to him, Palmer, to vote for Broderick if he, Palmer, would give him \$5,000, which proposition he, Palmer, courteously declined, and that was all there was of it.

Thus the character of the investigation was at once changed. Palmer became the accuser of Peck, and was on the stand as a sworn witness in support of his charge. This was before the law permitted a party to be a witness in his own behalf in either a criminal or a civil case. Peck had made his statement upon his honor as a Senator, and in no sense as a witness, except in so far as his constitutional oath of office bound him to speak the truth. He was not required to be sworn as a witness. He was a poor, obscure, uninfluential, and comparatively friendless, country member. Palmer was a power in the State. Under these circumstances this strange trial proceeded. There was, of course, no witness to the interview, and, therefore, every fact tending to support the statement of either party became important.

At the close of the testimony, some two days were spent by the Senate in determining whether Colonel Baker should have the opening and close of the argument, or whether General Williams should have that privilege; and some half dozen votes, by yeas and nays, are recorded in the journal, upon various propositions regulating the order of the summing up, without coming to an agreement, until at last the chivalrous spirit of Colonel Baker prompted him to request that General Williams should have the opening and close.

There was one striking feature of this remarkable controversy. While it was fought with the utmost tenacity on both sides, there was an entire concurrence on the part of those opposing the election and supporting Peck—that Broderick had no lot or part in the alleged attempt to bribe, and that he was as unconscious of any proceedings of that character being taken in his behalf as if he had been at the bottom of the sea.

The speeches of Colonel Baker and General Williams occupied two days. The former never, in all his brilliant career, made a more powerful address. And yet no remnant of it has been preserved. The extraordinary circumstances of the case challenged his powers in all their versatility. Palmer and A. A. Selover reeled under his invective. The "Selover Route" from San Francisco to Benicia has not faded from the memory of those who heard Baker then.

The Senate went into secret session, and there voted without debate. It was in a serious dilemma. There did not appear to be much doubt of Peck's honesty—none whatever of his imprudence in blurting out such a charge against a man of Palmer's standing, with no witness to prove it. The journals show that the Senate extricated itself as follows. Hall, Democrat, of El Dorado, moved the following resolution:

Resolved, That the statement made by the Hon. Senator from Butte, Mr. Peck, alleging against J. C. Palmer an attempt to commit bribery, has not been sustained by the evidence adduced in the investigation.

Many attempts were made to modify the original resolution offered by Hall, but it passed by a vote of 21 to 7. Catlin was among those voting in the negative. Immediately upon the adoption of the resolution Crabbe, Whig, of San Joaquin, offered the following:

Resolved, That this decision of the Senate in this case is not intended in any degree to reflect upon the honor and dignity of Mr. Peck.

This received 17 votes, with but one (Mr. Mahoney, Democrat of San Francisco), against it; ten Senators not voting. Whether Peck or Palmer won the fight has never been determined. The case offers some solemn lessons to young statesmen, as well as to members of the third house. Never attempt to bribe anybody. If you are offered a bribe, decline it, and, instead of pocketing the money, pocket the insult as quietly as circumstances will permit, unless it should happen (which is quite improbable) that you are able to prove the offer by other evidence than your own statement.

During the session of 1853 Mr. Catlin rendered important service to the city of San Francisco, and, in fact, to the whole State, in contributing largely to the defeat of the scheme to extend the city front 600 feet further into the bay. The city front was established by an act of the legislature passed in 1851; and another act in the same year authorized the construction of wharves at the end of the streets, not exceeding 600 feet beyond the water front boundary line. Certain parties claimed title to a tract 600 feet wide extending (a semi-circle) from North Beach to Mission Bay, in front of the established boundary line; and the scheme involved the repeal of the act of 1851, and the extension of the city front so as to take in the tract so claimed. The parties interested acknowledged that the State had some interest in the matter, and offered the State one-third of the property. Gov. Bigler was persuaded to believe, and honestly believed, the plan unobjectionable, and that it would be the means of relieving the State treasury from its then impoverished condition, and so he earnestly supported it, not only in his annual message, and in a special message to the legislature, but gave to it all his personal influence, which was very great, especially with the members from the interior and mountain counties. The measure also enlisted a powerful support in San Francisco, as millions depended upon its success. The whole extension tract was laid out in city lots, and the claimants had speculated largely in the sale of them.

The whole matter was referred in the Senate to a select committee, of which Mr. Catlin was a most industrious and active member. An investigation was held, and all questions, such as nature of the title claimed, effects upon the harbor, etc., were inquired into. Mr. Catlin was a known and

avowed opponent of the measure, and to him was committed the duty of writing the report, which duty was so well performed that it absolutely killed the scheme outright.

Governor Bigler was so disappointed and indignant, that he publicly proclaimed in the lobby of the Senate that he would take the stump in the ensuing season and advocate the measure "from San Diego to the Oregon line." But he did not, and he never afterwards advocated an extension of the city front. Every argument advanced in support of the scheme was overthrown, and the evil consequences which would surely follow its success were forcibly set forth in this report. It saved the city and harbor from vast injury, and time has verified the wisdom of those who set their faces against the accomplishment of this scheme. For strength of argument and deep research into the many vital questions affecting that controversy, this report, which may be found in the journals of the fourth session of the legislature, will bear favorable comparison with any public document in the archives of the State.

In 1854, after service in the State Senate for two years, Mr. Catlin's standing in the Whig party was such that he was tendered one of the nominations for Congress, but he declined it, and promoted the nominations of General (then Major) G. W. Bowie and Calhoun Benham. The Democratic party was then divided, but the Whigs were solid and hopeful. Milton S. Latham and James A. McDougall were then in Congress, and were renominated by the Freesoil wing of the Democracy. Latham refused to stand. Phil. T. Herbert and J. W. Denver were nominated by the Musical Hall or Chivalry wing. At the commencement of the canvass the latter apparently had not any chance of success, but later on it became known that they had received the secret nomination of the Knownothings, then first organized, and being a secret order. Their election was nevertheless a surprise to the State.

J. Neely Johnson, a Sacramento lawyer, was nominated and elected Governor by the regular Knownothings in 1855. During the short life of this party; whose existence practically ended at the close of the legislative session of 1856, Mr. Catlin eschewed public affairs, and devoted himself to his profession and his mining interests.

In the summer of 1856 a convention composed of about forty persons, constituted of "Old Line Whigs" and ex-Knownothings, nominated a ticket for the legislature, upon which they placed Mr. Catlin and Robert C. Clark (the latter afterwards County Judge and later Superior Judge), as Whigs, with two ex-Knownothings. During the Knownothing regime Colonel Philip L. Edwards had maintained a club of Old Line Whigs, of which Catlin and Clark were members, and which *boasted* 500 members. The two nominees, with little faith in the strength of the nomination, and both averse to making a canvass, which is always demanded in Sacramento county, at first resolutely declined, but were afterward persuaded and flattered into ac-

cepting the nominations. They were elected (to the Assembly) together with one other on their ticket—John H. McKune, afterward District Judge—while one of the Democratic nominees prevailed over Dr. Powell, the lowest on the combination ticket. Dr. Powell is dead. He practiced medicine, but was an inveterate politician. He was one of the most entertaining stump speakers of his day.

That legislative session opened in January, 1857. The most stirring and important event of the session was one in which Mr. Catlin acted a conspicuous part—the impeachment of Henry Bates, the State Treasurer. Early in the session vague rumors prevailed that all was not right in the treasury. At the instance of the Treasurer's friends a joint committee of both Houses counted the coin in the treasury on the 13th of January, 1857, and reported that, since the first of that month, the Treasurer had taken from the general fund \$124,000 and forwarded the same to New York to meet the semi-annual interest, to become due on the first of July next ensuing, upon the funded debt of the State, and that \$130,000 in coin remained in the treasury. These two sums would make the Treasurer's account good, according to the Controller's books. His action in sending so large a sum to New York more than four months before it was necessary, was excused by the committee as an overzealous act in the interest of the State; and was openly commended by the *Democratic Journal*, the organ of the Democracy at the capital, as a provident act, by which the legislature was prevented from squandering the money! The Assembly was largely Democratic, and was, apparently, satisfied with these explanations. Bates was a Knownothing. But there were a few members, prominent among whom was Mr. Catlin, who assailed this report, and openly expressed doubts as to the existence of the facts upon which it was based. It was verbally stated, in behalf of the Treasurer, that the \$124,000 was sent to New York through Wells, Fargo & Co., a statement calculated to allay suspicion as to the safety of the funds, and one quite necessary to allay such suspicion, by reason of the fact that twice before—once under a former Treasurer, and once under Bates himself, when the transmission of the money had been intrusted to Palmer, Cook & Co.—default in the payment of the interest had been made. It resulted from the debate that the Assembly, by resolution, immediately placed Mr. Catlin, much against his will, at the head of a select committee of three, with full power to send for persons and papers, and to investigate and speedily report upon the whole subject. He was thus suddenly placed in a position where he was made to assume the responsibility of charges which had been insinuated, rather than specifically made; and this, by the majority who believed in and supported the report of the Joint Committee. His position was critical. If he failed the Treasurer would triumph; and he, Catlin, would suffer heavily in public estimation. At this time he had never seen Bates, and never met him per-

sonally until the latter afterwards appeared before the committee. The Treasurer's friends, at first, were not at all alarmed. Their confidence that no discoveries could be made detrimental to him was manifested in newspapers, and in many other ways. But Mr. Catlin soon, through the favor of a prominent banker, now deceased, and through other sources, became possessed of information which enabled him to summon witnesses, by whose testimony he completely uncovered the most carefully concealed but most stupendous frauds. This testimony positively established the fact that the joint committee, in the count of the 13th of January, had been deceived; that fully one-half of the coin found in the vaults on that occasion had been temporarily supplied by outside parties and had been withdrawn the next day. It was also proved that the \$124,000 payment was a pretence; that it had not in fact been sent to New York, but was a fraudulent contrivance to account for so much money previously abstracted from the Treasury. It appeared that an entry was made on the Treasurer's books on the 10th of January, stating that the money was sent to New York by Wells, Fargo & Co. This was the entry that met the eye of the joint committee on the 13th. After it was known that Wells, Fargo & Co. denied having received or sent the money, the name of "Wells, Fargo & Co.," was carefully erased and the name of "Pacific Express Co.," written over the erasure. This "company" was an ephemeral concern, of which the chief clerk of the Treasurer was President and manager. It was also proved by testimony that could not be denied, that during the whole time of the Treasurer's administration, Palmer, Cook & Co. had nearly all of the public moneys; that in July, 1866, when by the Controller's books there should have been about \$250,000 in coin in the vaults, there was in fact only about \$16,000 there, and that was removed and deposited with Wells, Fargo & Co. under a scare on the part of the Treasurer, who one day heard that the Vigilance Committee was on the way up the river to capture the State Government. Such a conquest, by the way, if it had happened before the Treasurer removed the funds, would have exposed the nakedness of the treasury.

It is due to the memory of the unfortunate Treasurer to say that it did not appear that he had personally profited a cent by his defalcations, which, by Mr. Catlin's report, amounted in the aggregate to the sum of \$200,000, during the brief period of one year. He was a physician by profession, with little experience in, and no taste for, public affairs. His nomination had been procured, against his own wishes, by Palmer, Cook & Co., one of the members of which firm was his boyhood companion and friend. He had accepted the office with reluctance, and had, in fact, with an apparent unconsciousness of wrong, allowed that firm to administer it. He had implicit confidence in their financial soundness, and in their promise to make good the moneys used by them when required. This promise could not be fulfilled, as the banking

house was in fact then insolvent, and its necessities compelled it to abandon the Treasurer to his fate, after making the best fight possible to protect him by a concealment of the defalcation. The end can be told in a few words. Upon the reading of Catlin's report to the Assembly, on the 9th of February, the Treasurer was invited to make any explanations he desired at twelve o'clock the next day. This he declined, stating that important business required his immediate departure for San Francisco, and asking delay. The response to this was the unanimous passage of a resolution impeaching him for misdemeanors in office, and the appointment of a Board of Managers, of which Mr. Catlin was one, to prepare articles for presentation to the Senate. Before these articles could be prepared he resigned his office. The resignation was accepted by the Governor, and a successor appointed and installed in office—an operation that was accomplished in less than twenty-four hours. Upon the hearing before the Senate, Bates was represented by a strong array of counsel, among whom were Charles T. Botts and Joseph W. Winans. The only defense made was that the accused, being out of office, was not subject to judgment of impeachment. The managers contended that he was impeached by the Assembly while in office, and could not escape a trial by resigning his office, and this view was sustained by the Senate, and the judgment usual in such cases was pronounced.

It was at this session that Broderick and Gwin were both elected United States Senators. Mr. Catlin voted for neither of them, but with sixteen others voted for Henry A. Crabbe and James W. Coffroth.

In March, 1872, Mr. Catlin was appointed one of three members of the then State Board of Equalization, and served as such until April, 1876. The most effective powers conferred on the board by the legislature were, after a prolonged contest, declared unconstitutional by three of the five judges of the Supreme Court, which led to the abolition of the board. During this period he was in the active practice of his profession, but found time to perform prodigious labor in the board named.

In 1875 Mr. Catlin was brought forward as a candidate for Governor before the Independent State Convention, but was defeated by the combined votes of the supporters of John Bidwell and Mr. Estee, which, on the final ballot, were cast for General Bidwell. In 1878 he was nominated by the joint convention of the Republicans and Democrats of Sacramento county, as delegate to the Constitutional Convention, but in consequence of the recent death of his wife and other causes, he declined the nomination. In 1879 he was one of the nominees of the Republican party for one of the seven Justices of the re-organized Supreme Court, and was defeated with all but one on his ticket.

Mr. Catlin's legal practice has been varied and extensive in the United States District and Circuit Courts in this State, in the courts of San Francisco,

in Sacramento and adjoining counties, and in the State Supreme Court. While in the active business of his profession he found time to perform to the satisfaction of the proprietors of the old Sacramento *Union*, the duties of chief editor of that paper at different times for considerable periods, and more particularly from September, 1864, at the commencement of the second Lincoln campaign, to April, 1865. His political articles were generally acknowledged to be just and fair by the Democratic opponents of the war, against whom they were aimed. He criticised Seward's English diplomacy, and condemned the surrender of Mason and Slidell. He supported Juarez through all his trials, and justified the execution of Maximilian in an editorial entitled "The End of a Tyrant," which attracted wide attention from its sentiments and style of expression. It was copied in Spanish in leading Mexican papers. In the course of ten years he successfully defended the Sacramento *Union* in eight different actions for libel.

Among the most notable and important litigations successfully conducted by Mr. Catlin, was the Leidesdorff ranch case. The title of the Rancho Rio de los Americanos, in Sacramento county, was confirmed by the Land Commissioners in 1855, *with specific boundaries*, and by the United States District Court in 1857. The Attorney General of the United States had dismissed an appeal in the case. These boundaries included the town of Folsom and the improvements of the Natoma Water Company upon several thousand acres of land. The water company and the inhabitants of Folsom engaged Mr. Catlin to examine the title, and he having pronounced it good they purchased the lands occupied by them of the executors of Folsom, and paid for them. Soon afterwards, in 1858, Hon. Jacob Thompson, Secretary of the Interior, summarily, and as Mr. Catlin always contended, without authority, set aside the survey of the rancho, which survey had strictly followed the boundary lines specified in the decree of confirmation, and ordered a new survey in a particular manner, by which the town of Folsom and the lands of the water company were excluded. There was no recourse against the executors of Folsom; and the parties who had thus lost their lands and their money naturally looked to Mr. Catlin for relief. He first contested the new survey in the Land Department, and afterwards in the United States District Court. He succeeded in setting aside the Thompson survey; but the one which followed it was but little better. It restored part of the lands to the water company, but still left out the town of Folsom. He succeeded in setting aside this survey and procuring a decree establishing the original survey, under which his clients purchased. From this decree the Government appealed, and the case came up for argument in the United States Supreme Court at the December term, 1863. Mr. Catlin went to Washington, was admitted to the Supreme Court on motion of Judge Jere Black, and after waiting four months reached the argument of the case. He was heard for

the greater part of two days. The case was exceedingly complicated, and the principles applicable to it were unsettled. The form of the survey was at first sight objectionable, and he entered upon the argument with the whole court against him, except Judge Field, who, as a Judge of the Supreme Court of this State, had become familiar with the principles of law applicable to the case. Mr. Catlin won six of the nine Justices over to his views, and obtained a decision affirming the original survey, upon which the patent subsequently was issued. Thus was finally settled the title, and a litigation was terminated, to which Mr. Catlin had devoted six years of earnest work. His clients had acted upon his advice in purchasing the property. He felt the weight of the obligation, and made good his purpose of maintaining the soundness of his opinion by a long struggle against the government, in which he overcame obstacles which would have discouraged a less determined nature. Like Mr. S. M. Wilson, he was on the losing side of the great issue between the farmers and the miners, being one of the six counsel for the Gold Run Mining Company in the trial of 1882, involving the rights of hydraulic miners. He conducted the examination of the witnesses upon some of the important branches of the case. His argument was confined to the facts, and did not deal with the law of the case. He contended that the testimony showed that the defendant's mining operations did not contribute in any appreciable degree to the injuries complained of.

Mr. Catlin is a man of indefatigable industry, of very sound judgment, and great power of investigation. He is one of the safest of counselors, unswerving in his fidelity to his clients, and a good man every way. In speech and argument he is slow but earnest. He has had little to do with criminal business. Having a good memory he can tell a thousand interesting reminiscences of early times in California. He is slow to anger, has no vices, possesses a generous nature, and, although little given to sport or humor, and having a serious, stern, almost morose look, is gentle in spirit and as tender as a woman. He is careless about money matters, doesn't think of his own needs—of what he shall eat, or what he shall drink, or wherewithal he shall be clothed. But this is hardly a blemish in *him*. A man of pure life, broad knowledge, and strong brain, he still holds a good clientage, and is the junior by some years of a score of men who are leaders at the bar of the State. He owns a very fine library, in which he takes more delight than in society, politics, or external nature. A California pioneer, familiar with all the motley scenes of time's latest drama, he is just touching upon the borders of a serene old age, the venerated confidant of the public, "Whole in himself, a common good."

CHAPTER XI.

John T. Doyle—Some Interesting Cases in New York and California—The Suit of Gov. Price, of New Jersey, against Squire P. Dewey and Gen. E. D. Keyes—The Convivial Wit, Sam. Ward—History of the "Pious Fund" of the Catholic Church—A Notable Argument—Peter Donahue Brought to Terms—E. J. Vandewater Taken At His Word—A Judicious Friend of Young Men—The Story of Col. C. P. Egan, United States Army—Some Interesting Personal Points.

John T. Doyle was born in New York City. His father had come thither from Ireland in 1815, himself a remarkable man with an original mind. He, the father, opened a bookstore in New York City and made a competency. His place was a literary center, and the circle of his friends was very large. He became widely known for his unfailing humor, his urbanity, his gifts of conversation, and his critical knowledge of books. Closing his business in 1851, he removed with his family to San Francisco, and died there at a great age. But he never got old. He could tell a story with a most solemn face. He loved to go to theaters, was fond of young people, ardent and sunny in temperament, full of romance, a passionate lover of the beautiful and poetic, and drank "the wine of life" to the very last.

John T. Doyle graduated from Georgetown College, District of Columbia, in 1837, taking the first honors. He studied law under Dudley Selden in New York City, where he commenced practice in 1842. There he formed a partnership with Eugene Casserly, which lasted a few years. In 1850, being in bad health, he turned away from the profession, and accepted the position of superintendent of the Nicaragua Canal Company, of which the elder Vanderbilt was the chief spirit. After remaining in Nicaragua eighteen months, he returned to New York. In 1851 he came to San Francisco with his father's entire family, excepting his younger brother Emmet, who had arrived in 1849.

Mr. Doyle's long life at the bar in San Francisco was broken by his removal to his native city, whither he went in 1856 and where he remained about three years. During that period he was in partnership for a time with Mr. Rapallo, afterwards a Judge of the New York Court of Appeals, and Horace F. Clark, a son-in-law of the elder Vanderbilt. He also served for awhile as assistant district attorney. A great case which he successfully

defended in New York will be noticed below. Returning to San Francisco in 1859, he resumed law practice there, and has ever since been one of the largest figures at that bar. Since his first arrival in 1851, he has been in partnership, at different times, with Eugene Casserly, with Janes & Barber, with Janes, Barber & Noyes, with Janes, Barber & Boyd, with Barber, Scripture & Bugbee—his firm now being Doyle, Galpin & Scripture, (Philip G. Galpin and Henry D. Scripture).

In 1876 Mr. Doyle was appointed by Governor Irwin one of the Commissioners of Transportation (Railroad Commissioner), his associates being General George Stoneman (afterwards Governor) and Isaac W. Smith. That was generally applauded as an able and faithful and industrious commission. The report submitted by it to the legislature at the close of the year 1877, was the product of the most patient investigation. It covers, with its tables and exhibits, a large octavo volume of nearly 500 pages. Mr. Doyle made railroad problems, questions of fares and freights, etc., a serious study for many years. On all matters affecting railroads he came to be popularly regarded as being better informed than any other man in the State. He was known as a strong anti-railroad man, and a stern anti-monopolist. He was prominent in the Committee of One Hundred during the excitement in regard to the possible occupancy of Goat Island by the railroad company, in 1871.

Mr. Doyle is a fine representative of the leaders of the New York bar. The conditions of law practice in that great city are such as to develop a class of minds not seen elsewhere. He has a strong, fertile, and acute brain, is thoroughly grounded in the law, is quick, sharp, ready and full. He is a clear and logical reasoner, has an eminently practical mind, and is a genius in the line of devising remedies. His addresses to the bench are models of legal argument, and if he is stronger before juries, as many say, it is because of his rich and perennial humor. He is fluent in speech, forcible, hardly eloquent, never repeats and never hesitates. He does not select his words or phrases in advance. In addressing a jury Mr. Doyle has a habit of singling out one man, as soon as he catches one interested, and talking to him alone for several minutes at a time. He keeps the jury in good humor. His facts are presented with admirable system, and in a very entertaining way. When he has a case naturally dry and tedious he informs it with life and refreshes it from his inexhaustible fund of merriment. A wonderful intuition is his. Both bench and bar have the greatest respect for his genius, and no intelligent stranger can talk with him half an hour without being impressed with the dignity of his intellect.

Perhaps the greatest law suit which ever engaged his attention was that of Rodman M. Price against Squire P. Dewey and other prominent citizens of San Francisco. This was in New York City. Price, whilom Governor of New Jersey, was, during the Mexican war, and some years after the ac-

quisition of California, a purser in the United States Navy. His vessel entered San Francisco harbor about the time of the conquest, and Price came ashore and walked about and around the little city with his eyes wide open. He bought real estate, and was soon a rich man, but kept his place in the navy for some years longer. Returning to the Eastern States early in 1850, he left his power of attorney with Edmund Scott. In the summer of 1851, he was in San Francisco a few months, and again departed, having substituted General E. D. Keyes, of the army, as his attorney-in-fact in place of Scott, who was about to visit South America. The next year Scott returned, and Price gave a new power of attorney to Keyes and Scott jointly. In the spring of 1853, Price held thirty-one pieces of real estate in the heart of the city, including the old postoffice. They were assessed low—in the aggregate, \$73,400, and were heavily mortgaged; besides Price had a large floating unsecured indebtedness. The first of July was approaching, when a law would take effect, permitting foreign creditors to attach real estate. Keyes and Scott apprehended that their principal would be swamped by foreclosures and attachments, and they determined to "clean up" before July first. They sold all the property for \$135,000, to Theodore Payne and Squire P. Dewey, the purchasers to assume the mortgages. The property speedily rose in value, and Price's indignation at the sale rose in proportion. He declared that the property had been needlessly sacrificed. Some two or three years later he commenced suit for damages in New York City, against Payne, Dewey, Keyes and Scott, alleging that they had conspired to defraud him of his property, and laying his damages at \$500,000. Dewey being then in New York City, Price had him arrested just as he was about to take the steamer for Europe. He was released on bail in the sum of \$25,000.

The trial of this case was a great and costly struggle. Mr. Doyle, who was then, as intimated, residing in New York City, was attorney for Dewey. He had a commission directed to Robert F. Morrison (since Chief Justice of the Supreme Court), who took, on behalf of the defendants, the depositions of prominent citizens of San Francisco. These included Judge M. H. McAllister, Hall McAllister, Horace P. Janes, James T. Boyd, Elisha Cook, Horace Hawes, A. J. Bowie, John Caperton, Milo Hoadley, A. G. Abell, Michael Reese, James Lick, Judge Edward Norton, Colonel E. D. Baker, Lafayette Maynard, Benjamin Davidson, George W. Wright, George Gordon and C. V. Gillespie. The interrogatories and cross interrogatories were all framed in New York, the former numbering 103, the "cross" 144.

Price's principal friend in the fight was Sam. Ward. This man was a member of a New York banking house, a great wit, a most engaging talker, and of distinguished good fellowship, peculiarly so on convivial occasions. He once was United States Minister to Brazil, and afterwards passed most of his time in Washington. Judge Field speaks of him favorably in his auto-

biography. Ward, too, had lived in San Francisco, was acquainted with Price's affairs, and knew all the parties to the suit under notice. He made a strong affidavit in the case on the side of his friend Price. He swore that the property was worth when sold \$300,000, and that Payne and Dewey had realized from a sale of five-sixths of it, in six week's time, a profit of \$300,000. He implicated Michael Reese in the alleged conspiracy, and said some severe things about General Keyes. The latter made a counter affidavit, in which he hit back with vigor, as this short extract will illustrate:

"And deponent further saith that, from July 1, 1853, to January 1, 1854, his intimacy with said Samuel Ward was greater than it had ever been before with any man for the same length of time. Deponent saw him almost daily, and was so charmed with the liveliness of his wit, his knowledge of languages, his skill in gastronomy, his rotund, expansive appreciation of good wine, his easy practice of those flattering arts which enable him to spend so much money while he earns so little, that deponent was allured by him to slide away from the wonted austereness of his life and to give up much of his time to feasting and vain discourses, greatly to deponent's reproach as a sedate citizen, and, as he fears, to the hazard of his soul."

The pleadings, testimony, etc., in this case were printed, and comprise several large volumes. To come to the result, it was a signal victory for Mr. Doyle's client. It was about the year 1880 that Governor Price visited San Francisco again, and renewed the litigation, seeking to set aside the conveyance to Payne and Dewey, and also suing Dewey for libel. He failed again, and went back to the State which had once made him its Governor, a poor man.

Mr. Doyle's celebrated cases are too numerous to name. I come to the great effort of his life. This was over the Pious Fund.

"In the ages of faith, before the day
When men were too proud to weep or pray,"

the Catholic church of Mexico owned a very large amount of real and personal property in that country, which had been contributed by different individuals and societies, for the propagation of the Catholic faith among the inhabitants of Upper California and Lower California, for the endowment of the church in those territories, and for the maintenance of its ministers. This vast property became known as the "Pious Fund of the Californias," and the most munificent contributions thereto were made on the 8th day of June, 1735, by the Marquis de Villapiente, and his cousin, the Marchioness de las Torres de Rada. Their gifts, made by a joint deed, consisted of 450,000 acres of land, many farmhouses, chapels of worship, furniture, stores, merchandise, grain, large bands of sheep, hogs, horses, mules, cows and horned cattle. The lands conveyed, which were valued at the time at \$400,000, came to be worth many millions.

I take this impressive narrative from the record in the case :

The piety and benevolence of the Marquis Villapiente have had few parallels in history. It is recorded of him, in Alegre's "History of the Society of Jesus in New Spain," published in 1739, that he contributed to every pious enterprise, thanking the Almighty for every opportunity to do good. It was his rule, in relieving temporal wants, never to forego spiritual comfort. He was the apostle of many peoples and nations. His beneficence penetrated all the continents. He remitted to Africa large sums to ransom Christian captives, and founded at Algiers a hospital for their succor and spiritual consolation. He expended \$100,000 for the building of churches and support of missionaries in China and Japan. In Macao he founded a home of mercy for the rescue of foundlings found in the streets. He supported, by the expenditure of enormous sums, flourishing churches in the kingdoms of Travancor, Ternate, Madure and Coromandel. In the Philippines he founded a presidio of Boholan Indians as a protection against the attacks of the Mohammedans. The Church of Pondecheri, in the East Indies, was built by him. He sent large sums of money to Jerusalem for the ornament of the holy places and the security of pious pilgrims. In Europe he defrayed the whole expenses preceding the beatification of the venerable Father Luis de la Puente; rebuilt and re-endowed the College of Santander; built and endowed the College and Church of the Cave of Manessa; laid the foundation of a College of Missionaries at the castle of Xavier, in Navarre; served Philip V with a regiment of 570 men, armed and maintained at his own expense, for nearly a year and a half, for which service the King tendered him the vicerealty of Mexico, and which he declined. In America he gave daily alms to the poor and afflicted, bestowed numerous dowries on virtuous maidens, chapels and pious works, spent \$80,000 in building the convent of St. Joseph, of the Barefooted Franciscan Friars, at Tacubaya, and over \$200,000 in missions, vessels, and other necessities of California. He founded in Arizona the two missions of Busonic and Sonoydad, changing the name San Marcelo, by which the latter was called, to San Miguel, from devotion to the latter saint; contributed \$10,000 to the college of Caraces; \$10,000 to that of Havanas; and another \$10,000 toward founding a house of religious exercises in the City of Mexico.

Living to extreme old age, he made a pilgrimage to the house of Nazareth and the city of Loretto, in a garment of coarse cloth, under a vow not to shave his beard till he had offered up his devotions in that sacred place; distributed alms on every hand, made munificent offerings to the Holy Virgin; visited Rome, returned to Spain, and there gave away all the rest of his vast property, even down to his cloak; he then sought hospitality in the Imperial College at Madrid, where he made his vows with tenderness and devotion, to the edification of the whole court. He died on the 13th day of February, 1739.

The "Pious Fund," thus swelled by the munificence of the Marquis and Marchioness named, was held in trust by the Jesuits, who had charge of the Missions of California down to 1768, when, by order of the Spanish Crown, they were expelled from Mexico and California. The Missions were then turned over by the viceroy, first, to the Franciscan order; later, one-half to that order, the other half to the Dominican friars. In April, 1772, Lower California was assigned exclusively to the Dominicans, and Upper California to the Franciscans. The Crown fully recognized that it held the "Pious Fund" as a sacred trust, and devoted the income and product, through the ecclesiastical authorities, to the religious uses designed by the donors.

When Mexico became independent, her government succeeded as trustee

of the "Pious Fund." In 1836 the fund was, by act of the Mexican Congress, turned over to the Bishop of the Californias, Pope Gregory XVI having erected the two territories into an Episcopal Diocese. In February, 1842, by another decree of Santa Anna, all the property of the trust was sold for the sum represented by its income (capitalized on the basis of six per cent per annum) and the proceeds were paid into the public treasury, the government obligating itself to pay six per cent on the capital thereof thenceforth.

The property was bought (the bulk of it) by the house of Boraio and the Messrs. Rubio Brothers for two millions of dollars, to which was added over one million dollars previously borrowed by the government from the fund—making the total amount on which the government bound itself to pay six per cent per annum interest in perpetuity, exceed three millions. The Bishop of California remonstrated earnestly against this last decree, as being in violation of his rights and the law of 1836. In 1845 the General Congress restored to the Bishop and his successors the properties of the trust *which had not been sold*. When California passed under the American flag, payments from the "Pious Fund" by the Mexican government to the Catholic church here totally ceased.

By the convention of July 4, 1868, between the two Republics, the American and Mexican Joint Commission was constituted, to sit at Washington, and pass on all claims presented by citizens of either country against the government of the other. In the Fall of 1870, a memorial was presented to this body by Archbishop Alemany, Right Rev. Thaddeus Amat, Bishop of Monterey, and Right Rev. Eugene O'Connell, Bishop of Grass Valley, on behalf of the Catholic church in California, asking that an apportionment be made between Upper and Lower California, of the interest accrued on the "Pious Fund" since the treaty of Queretaro, and payment to the petitioners, in trust for the church, of the amount due the latter in this State. Mr. Doyle was the counsel for the church. He went to Washington and tried the case before the commission. He found opposed to him the ablest talent. The Mexican government had engaged Caleb Cushing and sent Don Manuel Aspiros to assist him. Mr. Doyle had, as attorney for the church magistrates, laid this claim before the Department of State eleven years previously, and this was one of the principal claims for the settlement of which the joint commission was created. He appeared before this latter body without any original documents, those papers all being in the archives of the Mexican government, but he was thoroughly fortified with evidence and argument. The eminent counsel for Mexico moved to dismiss the claim as stating no cause of action. Mr. Doyle then supplemented his lengthy memorial with an elaborate statement and argument of forty printed pages. These and his other briefs in the case have been published, but copies are very rare. In his first argument he states that he examined carefully every book, document, and scrap of Mexican history that he could find, hav-

ing the least bearing on the subject, including many public documents not to be found in published works. It was ably urged, on behalf of Mexico, that the Bishops of the church in California were not the proper parties to make the demand; that the "Pious Fund" had been confiscated to the Mexican government; that the claim was barred by article XIV of the treaty of peace, which released Mexico from all claims of United States citizens; and, further, that the Archbishop and Bishops claimant, being local corporations, could not claim property outside of their dioceses. In reply, Mr. Doyle argued (to reverse the order of these propositions) that all corporations are local in the same sense—viz., that they have some local *habitat*, and derive their corporate powers from some local law—but they may own property, and maintain and defend suits outside of the territory of the States which create them. There is no distinction in this respect between religious corporations and those organized for trade. If property belonging to an English Cathedral Church is wrongfully removed to the United States, the Bishop of such church, or the diocesan authority, entitled to the custody of its temporalities, can recover it in any United States court of competent jurisdiction. Besides, this is not a question of corporation law. The Bishops claimant, whether incorporated or not, can rightly press this claim, because they are the constituted authorities of the church. As to the claim being barred by the treaty, Mr. Doyle showed that Mexico was released by that compact only from such claims as had not *then* been decided against her, and which arose *previously* to the *date* of the treaty (February 2, 1848). At that date this claim was not a claim by citizens of the United States; it was by persons who were *then Mexican citizens*—the church of California being *then* part of the church of Mexico, and its political status being that of a Mexican citizen. This status was changed by the treaty—at the *ratification* of the treaty. *Then* it ceased to be Mexican and became American, and *thenceforth only* did its demands on Mexico become claims of United States citizens.

As to confiscation, Mr. Doyle traced the history of the fund from the time it was taken from the original trustees down to the decree of October, 1842, under which it was incorporated into the public treasury. In that decree Santa Ana declared it was the intention of the government to "fulfill most faithfully the beneficent objects designed by the founders, without the slightest diminution of the properties to the end," and "without any deduction for costs, whether of administration, or otherwise." Neither the Spanish nor Mexican government ever claimed the right, or exercised the power, of diverting the fund from its original purpose.

From this printed argument I take this specimen of unpretentious, vigorous style:

History furnishes frequent instances where the poverty of the public treasury, the rapacity of the monarch, or the cupidity of a favorite, has led to the spoliation of chari-

ties and other church properties. Such acts have usually been cloaked under the disguise of reform of abuses, or excused by the plea of great public necessity. The atheistical zealots of the French revolution were, I believe, the first to invent the idea that property dedicated to such uses was public or national property; but their acts in confiscating and treating it as such were condemned by the voice of all Europe, and repudiated, so far as possible, by France herself as soon as she began to recover from her delirium. Partisans, writing what they call history, have sought to excuse such acts in various ways, and philosophers have sometimes viewed them leniently, discovering in their remote consequences public benefits proceeding from individual wrong; but I am not aware of any instance where an independent tribunal, constituted to administer justice, has ever given them its sanction, or regarded them otherwise than as acts of mere arbitrary power, without legal justification.

In dealing with the proposition that the Bishops were not the proper parties to present the claim, Mr. Doyle displayed rare powers of argument and gave signal proof of the truth of his own statement, that he had given to this great cause the unwearied investigation of years. He evinced close acquaintance with ecclesiastical and profane history, declared the canon law applicable to the case, showed that the Bishops claimant were the only persons who could properly present the claim, and, in the course of his argument, took occasion to thus tersely restate his case:

Mexico, holding the Pious Fund of California upon trust for the use and benefit of the Catholic Church of California, being both *sovereign* and *trustee*, and having the entire power over the trust, not amenable to any court or tribunal, formally determines to appropriate the whole means and property to her own use, and substitute for it her own obligation to pay interest on the capital at six per cent. per annum, thenceforth. She is both purchaser and seller, fixes the price, the credit and the rate of interest without consulting the *cestui que trust*. The latter is powerless to resist the proceeding. All she can do is to demand performance of the promise which, without her consent, has been substituted for her tangible property. Her chief magistrates, recognized over and over again by Mexico, as representing her in this regard, are here demanding on her behalf the enforcement of the obligation; if they are not the proper parties to do so, it is not easy to see who are. * * * The Bishops represent fairly the numerous body of Christian people over whom their spiritual jurisdiction extends, and would for that reason be competent plaintiffs on behalf of the whole body, even before a court of equity, where technical rules are rigidly enforced. Tribunals like the present, (the joint commission) are not trammelled by such rules, but proceed upon the broad foundation of substantial justice.

Don Manuel Aspiros made an ingenious plea on behalf of his government, showing great learning; but in his reply Mr. Doyle politely revealed its utter fallacy. When he had done with his adversary, the *dissecta membra* of the Mexican lawyer's argument presented a sorry spectacle. Mr. Doyle recovered for his clients, at the end of this long and hard fought fight, nine hundred and six thousand dollars. He was amply rewarded for his great services, being paid a more than princely fee.

Mr. Doyle has strong convictions, is a good friend and an implacable enemy. Of warm impulses, he is yet very arbitrary. He has been a hard

worker through life, and is exact and methodical about everything. He has the truest judgment, is plain and concise in statement, intrepid in assertion and in action. His information is very wide, his memory excellent, he has rich classical stores, is one of the best of Latin scholars, and has a Latin quotation ready for any emergency. Horace is his favorite Latin author; he quotes him *ad libitum*. He has a great turn for mathematics. In diplomacy he would win great distinction. As a negotiator he is the peer of Lloyd Tevis. He negotiated the sale of the San Jose Railroad by Dame and McLaughlin, the builders, to H. M. Newhall, Peter Donahue and C. B. Polhemus. He represented the purchasers, and urged upon them to reduce rates. They declined, but he gave them no peace till they yielded, and they soon saw the wisdom of the policy.

This firm counselor held Peter Donahue's power of attorney, when that gentlemen went East, during the conflict between the two gas companies of San Francisco, now many years ago. He effected a compromise between, and a consolidation of, those companies. A very respectable bill was that which he presented to Mr. Donahue on the latter's return, for he knows how to charge. Mr. Donahue declined to pay the whole of it, and Mr. Doyle would not abate one cent. He did not want to sue Mr. Donahue, and for some time did not know what course to pursue. Learning that an act was about to pass the legislature, granting Mr. Donahue and associates a street railroad franchise in San Francisco, Mr. Doyle hastened to Sacramento, and quietly got an eight hours clause inserted in the proposed measure. A few days later he received a check for his full demand. Then he lost his interest in the eight hours clause, and the bill passed without it.

He handed R. J. Vandewater a large bill, one day, in his (Doyle's) office. Vandewater said it was unreasonable, extortionate, and surprised him—one-half of the charge would be too much. But he would leave it to Mr. Doyle's sense of propriety. He asked Mr. Doyle to sit down and make out a check for whatever sum he thought was just, after having heard his (Vandewater's) protest. "Recollect what I have said, and make out the check, and I will sign it," said Vandewater. Mr. Doyle sat down and made out a check for the full amount of his bill. Vandewater signed it and left the office, to which he never returned.

This bar leader has materially helped many youths, and advised, encouraged and guided them. Many lawyers look back to his office as the place where they first opened their books, and found help in study. He has no patience with stupidity, and when he finds a boy is dull he lets him severely alone. He is very much attracted by brightness and alertness in boys. In this connection may be told a pleasant story, and a true one of the relation once existing between him and a little boy who is now a Colonel in the United States Army. The boy's parents were poor people, living in New

York City. He was a bright lad employed in a lawyer's office. Mr. Doyle took a fancy to him and brought him to San Francisco at his own request and that of his parents, and employed him in his office here. Fearing the young man might get beyond his (Mr. Doyle's) control as he grew up, and might fall into bad company, Mr. Doyle exacted a promise on honor that at any time he required it, the lad would return to his parents. Finding better employment for him than in a law office, he got him the situation, and thereafter the young man worked his own way and pushed on by his own merit. After some time Mr. Doyle thought his young friend was getting on too fast (wherein he may have done him injustice) and reclaimed his promise to go back to New York. The latter begged hard to be released from his obligation, but Mr. Doyle said: "You gave me your honor, my son: I expect you to keep your word." The boy was only about fourteen, but he was made of the right stuff, and he answered, "I'll keep my word, sir." He went to his parents. Subsequently he returned to this State on his own responsibility, and shaped his own fortunes. What he owed and owes to Mr. Doyle were the opportunity of first coming to the region of his prosperity, and the good will and friendship which Mr. Doyle has ever since felt for him. Reference is here made to Colonel C. P. Eagan, U. S. A.

Mr. Doyle is a capital diner-out; indeed, in that delectable role, he would not suffer eclipse in the presence of Sam Ward himself. There his wit sparkles and his information pours continuous. His stories and his sallies are entirely free from blasphemy, vulgarity, or slang. Social, but not much given to club life, he likes a fine dinner, is an excellent judge of wine, and is very hospitable. He has a keen appreciation of the very best in everything. His library is a wonderful repository of varied lore. In the rarity and beauty as well as the value of its volumes, it has few parallels. Of course, he loves Shakespeare; he has every edition of the master's works. His "Don Quixote" is a marvel, too; he has the text of one of the best editions, bound up with the illustrations of *all* the editions, and the work is so skillfully done as to suggest but one original and complete book.

His father, having the most absolute confidence in his integrity and ability, left his entire estate to him by will. He (John T.) called the natural heirs together, and said he should hold the estate in trust, and make an equal distribution, which he did. In association with his father, Governor Haight, Eugene Casserly, and others, he bought the Pulgas rancho and sold it in small parcels. He straightened out the title, laid out Menlo Park, and built a fine residence there. He married, in New York City, about 1856, Miss Pons, a French lady, a native of Lyons. The lady is living, and there are five sons and three daughters—all of whom speak French as fluently as their mother—if I said as fluently as their father, it would be the same. Mr. Doyle is very strong in his family ties—perhaps a more intelligent and happy

family group cannot be found than his. He has one brother, already mentioned, and a sister—the widow of Eugene Casserly. At the age of sixty-seven years, with an estate worth half a million dollars, he still holds to the work of his life, and comes to San Francisco every other day from his home at Menlo Park. There he has a lovely villa, with some 400 acres of rich land. A few years ago he bought a vineyard near Mountain View, Santa Clara County, and has been making the finest wine in the State, as the sales in the market attest. He also planted 150 acres more with the choicest cuttings. He superintends his vineyards personally. His main object in this industry is to lengthen his own life, to give to his boys healthful employment while he survives, and to leave them a noble heritage.

CHAPTER XII.

Alexander Campbell—A Reputation Early Won at the Brooklyn Bar—District Attorney of King's County, New York—Another California Pioneer—Peculiar Controversy Over the Office of County Judge in San Francisco—A Dejected Grand Jury—References to Some Celebrated Cases—His Address in the Fair Murder Trial—Personal and Professional Traits.

I come to one who long enjoyed the distinction of being the first criminal lawyer at the San Francisco bar. In the public mind he was associated with criminal trials, and it is true that he had shown himself at his best in that role; but this was because he had more business, and, therefore, more opportunity, in that department of law. Of course a lawyer, even of the first class, cannot always, nor often, control the course or character of his professional work. The people have much to do with deciding whether a lawyer must confine himself to a special line of cases. As was observed of McAllister, they frequently persist in assigning a lawyer to a specialty, when he has none. An advocate may, and often does, at the outset of his career, by a masterly effort, establish a local reputation for special aptitude and ability in a particular line, when he is really entitled to a more catholic judgment, a broader fame. He will inevitably become involved with his cause, and the more close his devotion to any cause, the more apt is he to be assigned to the class to which such cause belongs. If he signalize his entry upon the active duties of his profession, by a powerful prosecution or a brilliant defense of a great criminal, he will win the reputation of a criminal lawyer, and will be fortunate if afterwards he can build up and wield a general practice; while if it be a great land case that shall disclose the riches of his intellect and the stores of his erudition, he will probably do a land business, if not a "land office business," the remainder of his life. But those whose lots are cast in sparsely settled communities, where the division of labor is never strongly marked, are not so affected.

It is not by his own preference that ex-Judge Campbell has devoted most of his time to criminal practice. It is distasteful to him to be assigned to any specialty. He loves the law in its integrity, and disclaims having special fitness for any particular branch. It is not strange, however, that having been called, in very early manhood, to be the public prosecutor in the

great center of American life, criminal practice should thereafter engage his principal attention.

Alexander Campbell was born in Jamaica in the year 1820. That beautiful little island has been the birthplace of a number of great men. There was born Sir James Scarlett, Lord Abinger (1769-1844), represented as one of the most popular and prosperous advocates of his day; who enjoyed for many years, in London, a practice of £10,000 per annum. He was Solicitor General (1829) and Chief Baron of the Exchequer (1834). There was born Robert Charles Dallas (1754-1824), a British author, an extensive writer on history, natural history, biography and fiction. He was once the warm friend of Byron, but the two came to disagree. There, too, was born the brother of the last named, Alexander James Dallas, father of George Mifflin Dallas, Vice President of the United States during the Mexican war. He became one of the most distinguished of American lawyers. He was born the same year with "Bobby" Burns, and died in 1817. He was Secretary of the Treasury. His law reports are the oldest in the United States except Kirby's. Lord Mansfield declared them to be "creditable to the court, the bar and the reporter." This Dallas drew up the marriage contract between Jerome Bonaparte and Miss Patterson, of Baltimore, in 1803.

Mr. Campbell's father was a Scotchman, as was the father of Robert and A. J. Dallas, and was a planter in Jamaica. Upon the abolition of slavery in the island, he removed with his family to Canada. He sent Alexander to England, and gave him what is sometimes called here a grammar school education. The young man went to Brooklyn, New York, when he was sixteen years old. The oft-used expression "architect of his own fortune," may be applied to him, if to anybody—which I sometimes doubt. He did not inherit a dollar. Not to dwell upon his youthful struggles, he is found honestly and earnestly acquiring a knowledge of law. At his majority he is admitted to practice, and for some years follows his profession successfully, attracting the notice of his seniors by his correct judgment, and his lucid, impressive method of argument. Before he is 30 years old he has been City Attorney of Brooklyn, and District Attorney of King's County. In the latter office he has won a reputation for being an indefatigable, sometimes a fierce, prosecutor of public offenders, whether they operated singly or in bands, cliques or rings.

Mr. Campbell first came to San Francisco in August, 1849. He had been practising at the bar a little over a year when he became County Judge in a novel way, or rather at the end of a novel legal controversy. William H. Clark, another pioneer, was regularly elected County Judge at an election appointed by law. On the very day of the election, while the voting was in progress, the legislature, then sitting, passed a law repealing the act under which the election was being held, and conferred upon the Governor the

power to appoint a County Judge. The Governor approved this repealing act *on the same day*, and a few days thereafter appointed Alexander Campbell County Judge. A conflict arose between Messrs. Clark and Campbell, which was carried before the Fourth District Court by *quo warranto*, and thence on appeal to the Supreme Court, resulting in a triumph for Campbell; it being held that the repealing act took effect *on the day of the election* and before the voting terminated, and that the election was therefore void. The decision of the Supreme Court in this case was rendered by Judge S. C. Hastings, Judge Lyons concurring. There were only three members of the court at that day. Judge Bennett, the remaining member, expressed his dissent, declaring that the repealing act did not take place until the day after the election, and that, therefore, the result of the election could not be disturbed by the legislative enactment. It was agreed that the repealing act took effect from and after its passage. Judges Hastings and Lyons held that it took effect the very moment the Governor signed it. Judge Bennett held that an act taking effect from and after its passage, does not become operative until the next day after its passage. (First Cal. Reports, 406).

By virtue of his position as County Judge, Judge Campbell was Presiding Justice of the Court of Sessions, which tribunal was composed of the County Judge and two Justices of the Peace as Associate Justices. While the Court of Sessions was sitting one day—present, Alexander Campbell, presiding Judge, and Edward McGowan, associate—an event occurred which probably has no parallel in legal annals. It was the ninth day of September, 1851. The grand jury came into court, and through their foreman, presented and read a written request to be discharged, on the ground that the executive, Gov. McDougal, had pardoned “a certain criminal, a notorious enemy of peaceable men.” The court refused to discharge the jury. Judge Campbell remarked that if the jury were to be discharged upon the ground set forth in their report, the court could not refuse, if requested, to discharge the next grand jury; and the next; and not only that, but every officer of the law might, with the same propriety, desert his post and abandon his duties, and so leave the country in anarchy. The grand jurors, having relieved themselves in some measure, returned to their duties.

Judge Campbell resigned his seat on the bench about six months before the expiration of his term, and was succeeded by Judge T. W. Freelon. He resumed law practice, which he pursued until the organization of the Vigilance Committee of 1856, when, as Dickens said of London, in describing the religious riots, “the city rose like a great ocean.” On account of his opposition to that organization, he withdrew to the Sandwich Islands, for a year. He returned and resumed practice in 1857. From that time until 1881, when he again removed from the city, he was a conspicuous figure at the metropolitan bar.

It is pleasant to see a lawyer now and then break the monotony of his professional life by touching other fields—as those of literature and science. But Judge Campbell has never done this. He has never employed his pen to probe any theme; he has never spoken on any subject but law, with a single exception, when he appeared on the lecture platform in Oakland for the benefit of a religious organization. He is a great reader of miscellany, doing his reading at night. Walter Scott is his favorite author.

He is not a hard worker, nor a close student. He funded in early manhood a large store of information—legal and miscellaneous—a store which always honors his drafts. Of course, like any lawyer worthy of the name, he keeps himself well posted on the Supreme Court decisions, but that is about all the regular legal reading he does. It cannot be said that he ever neglects his case, but he relies chiefly on his native tact and the abundant resources of his mind. He has also, as was said of Burke, great “resources of countenance.”

Among the more noticeable of the cases in which he has been engaged, may be mentioned the Black will case; the Harry Byrne will case, in which Matilda Heron was the contestant; the impeachment of Judge Hardy, 1862; the breach of promise case of Clark vs. Reese; the case of the People vs. Clark; the two trials of the Brotherton brothers, for forgery; and the two trials of Laura D. Fair for the murder of A. P. Crittenden; the case of Kalloch, indicted for the murder of Charles De Young of the *San Francisco Chronicle*; and the case of Spreckles, indicted for assault to murder M. H. DeYoung, surviving proprietor of the same paper.

The case of Clark vs. Reese was brought by a widow against, perhaps, the then richest man in the State. Campbell represented the plaintiff, and McAllister the defendant. Campbell managed it superbly, fighting at a great disadvantage. He made a fine argument, and gave McAllister a surprise he had not before experienced. The defendant, refusing to answer certain questions, Campbell moved for judgment against him for the whole amount sued for—\$100,000—and pressed his motion with ability and persistence. McAllister was compelled to ask an adjournment, which was granted him. The next day Reese answered the questions. The plaintiff recovered judgment for \$6,000, which was paid. Judge Campbell's fee was \$1,500. He was called into the case by John Lord Love, who was attorney of record, and who received a similar amount. The plaintiff got the residuum—\$3,000. She and her lawyers reversed Napoleon's maxim, “Divide and conquer;” they conquered and divided.

The case of the People against Captain Clark, of the ship *Sunrise*, was tried in the United States Circuit Court before Judges Sawyer and Hoffman in 1873. The defendant was charged with cruelty to his seamen. Some of his crew told harrowing tales. Great excitement pre-

vailed in the community. The proprietors of a San Francisco journal engaged General Barnes as special counsel to assist the United States District Attorney; Judge Campbell and Milton Andros defended. Judge Campbell's speech to the jury was published at the time. It shows what a brilliant advocate can say for a bad cause. The defendant was convicted, but the argument of his chief counsel was the most ingenious and powerful I have ever heard at the criminal bar, except that of the same advocate on the trial of Mrs. Fair. The case referred to of the Brotherton brothers was the most important forgery trial that ever occurred in California.

The Fair murder case has been touched in the chapter on Byrne. Laura D. Fair, a lawyer's widow, was twice tried in San Francisco on an indictment for the murder of a leading member of the bar—A. P. Crittenden. On the first trial, in 1871, Harry H. Byrne was District Attorney, and Elisha Cook and Leander Quint appeared for the defendant. The latter was convicted of murder in the first degree, and was sentenced to be hanged. She secured a new trial, and on the second trial, in 1872, D. J. Murphy was District Attorney, while N. Greene Curtis and Leander Quint represented the defendant. Between the two trials, Byrne on the one side, and Cook on the other—two of the best minds at the bar—had died. On both trials Alexander Campbell assisted the District Attorney in the prosecution. His speech to the jury on the first trial was reported *verbatim*, with all the proceedings, and published in pamphlet. This speech is worthy of study by the law student. It is in Campbell's best vein; is bold, argumentative, manly and powerful; shorter than any other of the four speeches in the case, but just long enough, and delivered, as is his custom, without notes. His fame as an advocate will rest chiefly upon this effort. It does not contain a single quotation from poetry or prose. It is entirely divested of foreign ornament, but in itself is polished, symmetrical, complete. It is distinguished for its impassioned invective against free love, its skillful analysis of the character of the defendant, and its dreadful anathemas upon her plea of insanity, which he declared to be "a defense shameless, disgraceful, and destitute of any element which could commend it to the heart or judgment of any honest man."

This veteran advocate is a man of lightning perceptions—courageous, forcible, impressive, apt at citation, plausible in his theories, clear and strong in thought and voice, and animated in delivery. He finds attentive hearers in his juries. He gives no thought to the arts and tricks of practised speakers. Seneca's precept seems to be ever before him—"Fit words are better than fine ones." Very rarely does he turn aside from the realm of reason to the domain of feeling, yet can he, and sometimes does, touch with rare skill, the chords of sympathy, and sound the depths of the soul. More than once have I seen warmth, earnestness and power breathe about him, as he poured

forth a copious flow of that clear language which has been well said "to spring spontaneously from definite and precise ideas." Before a jury his movements and gesticulation are unrestrained; his voice pleasant, yet not musical, and his expression clear and condensed. He is the most unaffected of men. No man has less vanity. He never courts the reporters—never, by glance or movement, does he betray a consciousness that he is observed. Always confident and intrepid, but not reckless, "he looks forward to a coming argument as to a delightful pastime"—as Sheil said of O'Connell.

It is recorded that the famous John Sergeant of Philadelphia, in addressing a jury, seemed to take the jury into his confidence, and to ask their confidence in return. One of his competitors said that Sergeant "virtually got into the jury box, and took part, as it were, in the decision of his own case." I have seen Alexander Campbell do this. He virtually shakes hands with each juror. But this habit of "getting into the jury box" is more successful when done "virtually"—in another word metaphorically—than when done in physical reality. Hon. W. W. Foote, since Railroad Commissioner, once put himself into the jury box in San Francisco—not "virtually" or metaphorically, but actually—and this is what became of him, as very cleverly reported at the time. It occurred during the trial of the widely renowned Jimmy Hope for burglary, in the Superior Court, T. W. Freelon, Judge.

Mr. Foote, in speaking for the defense, had not proceeded far before he was reminded by the court that he was transgressing a court rule. "How so?" he asked in surprise. "You are standing inside the jury box," replied his honor. "And I claim I have a right to stand anywhere I want to," rejoined the attorney. "But my order is that you cannot," came next from the court. "I must be near the jury. I cannot talk unless I am," the lawyer persisted. Then said the Judge, "There is a place for the court; the clerk and bailiff have their places, the counsel theirs, and the jury its place. That is my rule, and I must see it observed, in this case, as in all others." "But, your honor, so long as I have no means of harming the jury, and my intentions are honorable——" "I can make no exception," said the court, sternly. "But I except! We except, your honor!" shouted Mr. Foote, triumphantly, and a glad light stole into his eyes at the thought that there remained yet another chance to except, even after his argument was begun. But he had to stay outside the rail? Yes.

Alexander Campbell, Henry Edgerton and William Higby were counsel for the State on the impeachment trial of District Judge James H. Hardy, in 1862. The accused was removed from office. At the next session an act was passed, under which the counsel named were paid one thousand dollars each. A few years later Campbell and Hardy were associated as counsel for the defendant in an important criminal case.

In 1881, Judge Campbell removed to Arizona, where he soon put him-

self at the head of the bar, and disabused the popular mind of the idea that he was a legal specialist. After five years in that region, he came back over the California line, and settled at Los Angeles. He has been for many years the regular counsel of the proprietors of the San Francisco *Chronicle*, and that continued engagement has caused his conspicuous reappearance in the metropolitan courts from time to time. He is married and has two grown sons in San Francisco, one of whom follows his profession and bears his name, as was observed of Judge Heydenfeldt.

CHAPTER XIII.

A Chapter of Pleasantries—Wit and Humor of Bench and Bar—Sallies of Judge E. D. Wheeler—Judge Stanley's Order to "Burn That Petition"—An Elaborate Conundrum—Characteristic Conduct of a Jury of Lawyers—A Constable With More Pomp Than Discretion—Anecdotes and Recollections of Ogden Hoffman, A. P. Van Duzer, Solomon A. Sharp, J. B. Townsend, M. C. Blake, William M. Zabriskie, C. T. Ryland, Joshua W. Redman, William Daniels, J. B. Murdock, and Others.

The law is reckoned a stern science; and it is certainly such to those attorneys who have not much to do. It is found to be tolerable by those whose tables are covered with fresh briefs of their own. Its jealousy, however, is proverbial. It has been called "an accumulating science" and those lawyers "accumulate" most who most propitiate it. It settles estates, dispenses fortunes, treats domestic woes, personal grievances, secures or denies individual liberty, affirms contracts, punishes crimes, upholds honor, protects life, sanctions death. But notwithstanding its solemn offices, it puts no mournful impress upon the hearts of its votaries—its humblest servants or its proudest ambassadors. The average lawyer is a man of good cheer. When his aspect is grave his heart is light. Often, on the trial of a weighty cause, the shafts of wit will fly, not alone between counsel, but between counsel and the bench. It would seem strange that a court-room could be the scene of merriment, considering the serious nature of the business there transacted. The fact is, however, that more genuine wit has been heard, more hearty laughter has been evoked, in crowded courts than in club rooms, dining halls or legislative assemblies. We like to laugh at the blunders of others, and the more solemn the occasion the more ludicrous appears the blunder. The court-room is pre-eminently the place for such things. It is either a witness, a juror, a clerk, a bailiff, a lawyer, or the judge himself—sometimes several of them together—to whom the mishap is due.†

"Go and get me 5th Howard," said a distinguished San Francisco counselor one day in 1865, in the Fourth District Court. He was "distinguished" hardly more for his ability than for his eccentricity, and he stopped in his argument to address these words to his clerk. He wanted the case of *Nevitt vs. Natchez Steam Packet Company*, reported in 5th Howard's *Mississippi Reports*, page 196; but he simply told his clerk to "get 5th

Howard." Now, there are Howard's Mississippi Reports, Howard's New York Practice Reports, and Howard's United States Supreme Court Reports; and the clerk, when he had rushed, out of breath, into his employer's library, soon found on the shelf one 5th Howard, and clutching it hastily, returned to the court. But it was not Howard's Mississippi; it was a New York Howard. Taking the book from his clerk's hands, the counselor, bending over his memoranda, observed: "Your Honor, I will now read you the case of Nevitt vs. Natchez Steam Packet Company, reported in 5th Howard's Mississippi, page 196." Then he slowly opened his book, and turned to the page. Instead of being the case of Nevitt vs. Natchez Steam Packet Company, it was *Hernstein vs. Matthewson*. Looking at the cover, he found it was a New York Report. "Your Honor," he said, "I sent my clerk for the authority I wanted, telling him distinctly it was 5th Howard's Mississippi, and he has brought me 5th Howard's New York Practice. I think he did this mean act with malice aforethought. My experience with law clerks is that they are fit for nothing but to draw their salaries and eat free lunches." He took a breath of relief, and proceeded with his argument, the court having made a note of the absent book.

The late Solomon A. Sharp, once State Senator, and who held other high honors in San Francisco at various times, and who enjoyed a fortune for many years before his death, was not noted for his alertness of movement. He was also inclined to procrastination, being seldom ready to try a cause until after several postponements. One day, in the Nineteenth District Court, Judge E. D. Wheeler presiding (I coupled these names on page 85), a cause, in which Mr. Sharp was for the defendant, was called for trial, and Mr. Sharp astounded the attorneys present, and especially the plaintiff's counsel, by promptly responding "Ready." He was eager for the fray that time, although the case had never been reached for trial before. This was something the plaintiff's counsel had not anticipated. That unhappy man urged a postponement as persistently as he could, but having no legal ground, he did not say anything to the point. Mr. Sharp insisted on a trial, saying his witnesses were in court, and he called attention to the fact that no legal excuse was presented by the other side for not being ready. Then Judge Wheeler came to the relief of the plaintiff's attorney: "Mr. Sharp, I never knew you to be ready before. The plaintiff's counsel could not have foreseen this exigency. You have taken him, as well as the court, by surprise. Let the trial be postponed for ten days." There was a general laugh, but Mr. Sharp declined to even smile until he got outside the court-room.

Judge Wheeler said many good things on the bench. His humor, which was of the quiet order, would peep out in his most important opinions. It was really entertaining to listen to him when he rendered a decision. In nine cases out of ten these were oral, and in many instances were delivered

without notes. They were certainly models in style, and manner of their rendition. He had all the facts in his memory, and weighed them calmly. His intonation was that of conversation in an assembly of friends. The mirth with which they were usually touched did not detract at all from their gravity, because introduced in happy illustration. It, of course, greatly heightened the pleasure of the listener. No judge whom I have ever heard render an oral opinion, not even Hoffman or McKinstry, was more lucid in exposition than Judge Wheeler.

"Gentlemen of the bar," said this judge on taking the bench one motion day, "only short arguments will be heard; motions will 'go over' very easily this morning. I want to 'go over' myself."

Judge J. B. Townsend, who had been practicing at this bar for thirty years, and who, while being recognized as an able lawyer, had, strange to say, very slow movements of mind, appeared before Judge Wheeler one motion day, and the motion calender being called, ten were answered ready. Usually, ten "ready" motions can be disposed of in one or two hours. But Judge Townsend had the first motion, and another "slow coach" was the opposing counsel. Some of the attorneys who had other motions began to leave the chamber.

"Are you ready, Judge Townsend?" Judge Wheeler inquired.

"Yes, your Honor," said Judge Townsend slowly.

"No other motion will be taken up to-day," Judge Wheeler remarked, and settled himself in his chair, the picture of resignation, or, like "patience on a monument, smiling at grief."

In the month of August, 1868, one Alfred Moulin was indicted by the grand jury of this city and county on nine indictments for libel, the parties defamed being Ogden Hoffman, Stephen J. Field, Delos Lake, Robert F. Morrison, Hall McAllister, George C. Gorham, George E. Whitney, Andrew B. Forbes and William F. Babcock. Now these are no diminutive names, it will be agreed. Moulin was a "crank," and the history of his long and strange experience in our state and federal courts, in admiralty, in criminal libel, in contempt, etc., would make quite a book. The nine indictments against him, for some unexplained reason, lay pigeonholed for nearly three years, the accused being on \$9,000 bail, when, on July 10, 1871, he appeared in the County Court, and made motions for the dismissal of all the indictments. In support of his motions he held in his hand a printed petition of formidable proportions, which, not being vain of his elocutionary powers, he requested the clerk to read. The clerk read:

To the Hon. John A. Stanly, Judge of the County Court in and for the City and County of San Francisco. The People of the State of California, plaintiffs, vs. Alfred Moulin, defendant. On nine indictments for libel. Petition and complaint. Your petitioner, Alfred Moulin, being duly sworn, respectfully represents: That he is the

defendant in the above entitled cases, and that he is and has been a resident of this city and county for the period of twelve years last past. That on or about the 28th day of August, 1868, Ogden Hoffman, Stephen J. Field, Delos Lake, Robert F. Morrison, Hall McAllister, George C. Gorham, George E. Whitney, Andrew B. Forbes, William F. Babcock, Henry H. Byrne, John Middleton and others, willfully, wrongfully, maliciously—

The Judge interrupted and said: "This is sufficient, Mr. Clerk. Burn that petition, and enter an order that the motion is denied, because the petition is couched in terms disrespectful to, and contemptuous of, the court and its officers."

The clerk obeyed promptly, tearing the petition into slips and throwing them into the stove.

In the United States Circuit Court, before Judges Sawyer and Hoffman and a jury, in 1873, in the course of the trial of Captain Clarke of the "Sunrise," for cruelty to sailors, the defense called a seaman to testify to the Captain's reputation for kindness and humanity. On cross-examination by General W. H. L. Barnes, the following was elicited:

"Did you ever hear Captain Clarke's reputation for kindness and humanity talked about on the Mary Bently? (A former vessel of Clarke's.)

"Yes."

"Whom did you hear talk about it?"

"Well, Tom, for one."

"Who was Tom?"

"A sailor. Don't know his full name."

"Did you hear anybody else talk about it?"

"Yes."

"Whom?"

"All the sailors."

"What did they say?"

"When I used to take them grub."

"What did they say?"

"They said it was good."

"What was good?"

"The grub."

Joseph Smith was arraigned at the opening of the term of the Municipal Criminal Court, San Francisco, November, 1872, on an indictment for burglary. Having no counsel, the court tendered him the services of Mr. Charles Aiken, which were accepted. When the case was called for trial, December 6, 1872, George W. Tyler appeared for the prisoner. Mr. Aiken addressed the court at some length upon the situation, concluding with this elaborate conundrum: "Can an impecunious prisoner, who has counsel appointed for him by the court, and who afterwards comes into possession of funds, throw off on the lawyer who was ready to defend him for nothing, and secure the

services of another by the payment of a comfortable fee?" An affirmative response from Judge Blake caused the counsel to withdraw, and Mr. Tyler started in to earn his "comfortable fee."

That is one of the ways in which the rights of American citizens are trifled with in this part of the country.

In the last named court, July 19, 1873, the case of a certain prisoner being called, and no response being made, the court said:

"Are the parties ready?"

"I am ready, your honor," said the Assistant District Attorney.

After a moment's silence the prisoner arose in the dock and said, "I am not ready, your honor. My best witness is out of the city, but will be here in a few weeks."

"Have you a lawyer?" inquired the Judge.

"Yes, your honor."

"Who is he?"

"Mr. Aiken," (above mentioned).

"Then you had better let Mr. Aiken speak for you," suggested the Judge.

Thereupon that counselor arose slowly and said, finely: "Your honor, I was appointed by the court to defend this man, but I have maintained silence to see if some 'shyster' would not claim the case. None having done so, I suppose the prisoner has no money, and that I will really have to defend him." The trial was then commenced.

In the San Francisco Police Court, August 28, 1869, a prisoner on trial for vagrancy introduced in defense a lawyer, who, among other things, testified that he had been counsel for the accused in establishing the latter's right to an estate in the Probate Court. He said that when he took hold of the estate it was worth \$1,600. He was asked how much the estate was worth when he got through with it. The question was objected to as being impertinent, and the objection was sustained.

In the Justice's Court, at San Francisco, 1866, the Justice being Mr. Alfred Barstow, since associated in law practice with Hon. A. L. Rhodes, ex-Chief Justice of the Supreme Court, an Irish woman brought suit against a wealthy man to recover a small sum alleged to be due for washing clothes. A jury being demanded by the defendant, it was agreed between counsel that the constable (Samuel C. Harding) should summon the jurors from the bystanders. The constable accordingly summoned his men from those in and about the court-room, and it so happened that every man cited was a lawyer. The return of the constable showed service upon D. J. Murphy, Samuel Platt, George J. Wight, Judson Haycock, Wm. M. Zabriskie and others, all lawyers. The legal aspect of the jury being discovered and alluded to by counsel for plaintiff, it was agreed by counsel for both parties that the jury

—the first twelve called—should be accepted, and each juror was pleased to waive his rights, feeling himself to be in familiar, if not good company. On the close of the examination of the first witness, who was the plaintiff herself, Mr. Zabriskie, who was a prominent criminal lawyer and foreman of the jury, took the witness in hand, and put about twenty questions to her, consuming some twelve or fifteen minutes. Then the legal juror next to Zabriskie imitated his example, and took nearly as much time. The other jurors in turn followed suit, until the poor woman had been exhaustively examined by twelve jurors, and two hours had been consumed. Another witness was called, and when the counsel in the case had got through with him, the impatient woman looked at her attorney and the jury with a look of appeal, but the relentless Zabriskie soon dashed her hopes by putting a hypothetical question, and as he awaited an answer he ran his fingers through his hair, pushed up his coat sleeve some inches, disclosing his immaculate cuffs, and by his manner generally betrayed the utmost satisfaction with the situation, and his indifference to the lapse of time. Then, as that and the next two questions were being put and answered, there was a whispered and somewhat excited conversation between the plaintiff and her counsel. Soon the latter arose, interrupted Mr. Zabriskie's examination, and abruptly spoiled the programme of the legal conspirators on the jury—thus:

"Your honor," said he, "as the defendant has employed able counsel and brought several witnesses into court to resist the plaintiff's demand, I have sent for additional witnesses myself, whose appearance I first thought unnecessary. I have seven witnesses altogether, and the defense may have as many. I make no objection to the jurors putting questions to the witnesses, but I do not think it is 'in accordance with the eternal fitness of things' to pursue such a course on this trial. Our demand is just but very small, and we have concluded to make the defendant a present of it rather than suffer the penalty of sitting here and seeing fourteen witnesses examined at the rate of three a day. Your honor will please dismiss the case at plaintiff's cost. I will pay the jury's fees out of my own pocket." As the plaintiff left the courtroom precipitately the Justice said, "The case is dismissed." The plaintiff's counsel stepped up to the jurors to pay their fees, and said: "Haven't you fellows any better business talent?" The jurors accepted the two dollars each, and sent the total to the plaintiff, who thus, out of her lawyer's money, came within one dollar of "getting even."

A certain "small farmer" near the town of Sonora woke up one fine morning, and found that the grass had been cut from an inclosed plot during the night. Going into town, he found some freshly cut grass in front of a hay dealer's premises, and had the hay dealer prosecuted for larceny. The accused, on his examination before the Justice of the Peace, showed that he

was on a ranch ten miles off when the grass was stolen. His counsel asked for his discharge.

"Go slow," replied the Justice. "Let him first show who did steal it."

"Your honor," said the counsel, "I will effect my client's release by habeas corpus. I never could get justice in this court."

"No, sir," replied the Justice. "You never shall have justice in this court, while I am here."

In the Municipal Criminal Court, San Francisco, February 21st, 1873 (the Judge being M. C. Blake, who was Mayor ten years later), W. D. Sawyer, counsel for John E. Dunn, convicted of robbery, and arraigned for sentence, asked a postponement of sentence, to enable him to prepare an argument on a motion to vacate the verdict. He remarked, incidentally, that every one was presumed to know the law, but this was a fiction; it was well established that a great many do not know the law, and their ignorance was not their fault. Judge Blake conceded that no one knew the law—not even judges—except those on the Supreme Bench.

Thus will the gravest magistrate sometimes unbend. Judge Blake seemed, in his quiet way, to enjoy it, when the laughter of the lawyers present assured him that he had made a "palpable hit." The prisoner's counsel proceeded, and said something about his client having been neglected and deceived by his friends. District Attorney D. J. Murphy (interrupting): "The counsel cannot seriously hope to have the verdict set aside. He is, no doubt, appealing to time, in the hope of getting his fee in the case. I will not object to indulging him a while longer."

The passing of sentence was postponed for a few days, during which time the fee is thought to have been paid, as the motion to vacate the verdict was not further pressed.

Justice of the Peace Ford, of Martinez, who held that distinguished office at an early day, thought it essential to the dignity of his tribunal that it should be formally opened by constabulary proclamation. On one occasion the constable felt more than usually well, and opened court in these stirring accents: "Hear ye! Hear ye! the Honorable Justice's Court of Martinez is now open, pursuant to adjournment. Everybody will come to order, and everybody, whether they are plaintiffs or defendants, shall have fair play and an equal show!" The Justice called the constable to him, and officially rebuked him. "What do you mean," said he, "by such talk as that? What will become of my business if I give the defendant an equal show with the plaintiff. I am not safe with you here." Thereafter the constable's formula was shorter. Judge Dwinelle, of the old Fifteenth District Court, in whose district was Martinez, more than once told this story on Justice Ford, in presence of the latter, who always insisted however, that it was a base calumny.

In the case of somebody against John H. Moses, tried in the brave days

of old (about 1851) before Justice William Daniels, at San Jose, J. B. Murdock for plaintiff, Wm. T. Wallace (since Attorney General and Chief Justice) for defendant, the plaintiff obtained judgment, an erroneous entry of which led to a tedious complication. As was frequently done at that time in Justices' Courts, the judgment was written up by the attorney for the prevailing party. In this case, Murdock entered judgment against Moses Scott instead of against John H. Moses, his mistake arising from the fact that Moses Scott was a witness on the trial. Wallace discovering the error, informed the Justice that he would be sued for damages if the defendant's property should be sold on execution upon such a judgment. The Justice refused to issue execution, or to correct the judgment. In his despair Murdock concluded to appeal from his own entry. The appeal came before the County Court, Joshua W. Redman, Judge. Murdock had the court against him all the way through, being told that he could not take advantage of his own error. He left the court-room abruptly, with an expression of contempt. The court directed the baliff to call Mr. Murdock back. In another minute Murdock entered the court-room, and approached the immediate precincts of the judicial presence, with hat against his breast, bowing and smiling, and marveling whether he would be lightly rebuked or heavily fined.

"You seem agitated, Mr. Murdock," said the justice. "I only called you back to remind you that there is an old proverb, which has been made one of the rules of this court. 'If a man burns himself, he may have to sit on the blister.' Good-day, Mr. Murdock."

And Murdock withdrew, with grave mien.

A certain rawbone Jack was once the rawbone of contention (replevin) in San Jose, in the court-room of William Daniels, J. P., an old Englishman, before mentioned, who had settled in that locality A. D. 1846. C. T. Ryland, since a leading banker, but long a prominent lawyer and politician, appeared for plaintiff, and Mr. Sanford, Santa Clara's first District Attorney, a fluent, flowery speaker, and a wit of no mean order, represented the defendant. Sanford was partially deaf. The evidence being all in, Ryland "waived the opening," whereupon, and while Sanford was arranging some papers, the Justice announced judgment for the plaintiff, and the Constable immediately delivered the animal to that party, who rode off upon him. Sanford, not hearing the words of the Justice, and assuming that they referred to Ryland's offer to waive the opening, arose with deliberation to speak. He had proceeded some few minutes, to the great amusement of his opponent, when the Justice stopped him and said:

"Mr. Sanford, there is no use in your arguing the case. I have already given the plaintiff judgment."

Sanford (with that look of disgust which too often is seen on the lawyer's face when subjected to judicial outrage)—"The — you say!"

"Come to order, sir. Court is about to try another case," said the Justice.

"Is this the truth?" asked Sanford, turning to Ryland.

"Yes; and my man has the mule two miles from here by this time," answered Ryland.

"Well, your honor," said Sanford recovering, "I would bow to your decision, if it were properly amended."

"How is that?" asked the Justice.

"My client," continued Sanford, is fond of the beautiful jackass which has been taken from him. If the plaintiff will return him, I will give him instead an animal of much more positive and prominent qualities in the assinine line—a very jewel of a jackass—that is, with your honor's acquiescence."

"Why should I acquiesce?" asked the Justice again.

"Because," said Sanford, "the jackass that I should deliver, is the astute judge of this court."

A severe fine was promptly imposed, but never paid. The matter was pleasantly adjusted the same day at a bar of a different sort.

A special policeman convicted of assault and battery, in striking a prisoner on the head with his club, not necessarily or in self-defense, appeared before the Police Court, San Francisco, August 29, 1873, to receive sentence. Colonel A. P. Dudley, his counsel, moved for a new trial, on the ground of newly discovered evidence. He made an earnest appeal for the intelligent consideration of the court on behalf of the officer, who, counsel said, had been misrepresented while endeavoring to perform faithfully his arduous and difficult duties. The counsel twisted off into a tirade against the Prosecuting Attorney, who, he said, had hunted down a fellow officer of the law—in this instance with a vindictive spirit. Said the Colonel, concluding: "Well might this excellent policeman exclaim, in the language of great Cæsar, when stabbed by the chief among his supposed friends in front of the Roman Capitol, *Et tu, Brute!*" The Prosecuting Attorney was partially stupefied with astonishment for a moment, and then a cloud of ferocious indignation overcast his classic features, as he sprang to his feet and demanded the protection of the court from such infamous abuse. His honor commanded the Colonel to arise, and show cause why he should not be punished for contempt in stigmatizing an officer of the court as a brute! The culprit was somewhat disconcerted, but managed to stammer out an apology, to the effect that the expression which had given offense was merely a Latin quotation, which he had heard some time in his school days, and was a mild rebuke uttered by Cæsar to his friend Brutus—whom he was accustomed to call Brute, in a jocular strain, for short—when the latter stabbed him in the back. Brutus was an eminent lawyer of old times, and an honorable man, and the compar-

ison conveyed in the quotation which had unfortunately wounded, was not intended to disparage his friend, the Prosecuting Attorney, for whom he entertained the most profound regard. (*sic.*) T. W. Taliaferro arose in support of the offending lawyer, and intimated that he was familiar with the circumstances referred to by Colonel Dudley, and that the remark attributed to Cæsar was merely uttered in the manner of earnest inquiry. It might be literally translated, Who threw that last brick? The court remarked that the explanation was timely, full and satisfactory. The Prosecuting Attorney accepted it as complete, but he expressed his disapproval of the habit indulged in by some lawyers of dragging in *double entendre* quotations from the dead languages. This scene was reported at the time, and in reproducing it I have used most of the reporter's words.

"Your honor," said a witness on the stand in the Police Court of San Francisco, August 8, 1873, "the Prosecuting Attorney is trying to confuse me by surrounding my statement with legal vermifuge?"

"I think a little vermifuge will not hurt him, your honor," said the Prosecuting Attorney; "he is evidently trying to worm himself out of a fix," "If the attorney for the people," said the Court, "proposes to step from the domain of law into that of medicine, he will please not ask the court to furnish him with his first patient." "I'm through," said the people's advocate, and the witness left the stand.

In 1853, Colonel James once defended in the San Francisco Court of Sessions—T. W. Freelon, Presiding Judge—a man charged with assault with a deadly weapon. The accused and the person assaulted were both Irishmen. They having been old acquaintances, and their families being neighbors, their friends negotiated a treaty between them, which they ratified. It was agreed that the complaining witness would be as light as possible in his testimony, and the whole prosecution, so far as the witnesses were concerned, was decidedly weak. "Patrick," said Colonel James to the complaining witness, "now, didn't you tell the defendant here before he struck you, that he was a d—— Irish ———?" "Faith," answered Patrick, "and I did not. How could I, when I'm one myself!"

In the early days of San Francisco, Joseph Hetherington shot and killed Dr. Baldwin, on an open lot at North Beach, in a dispute about their rival claims to the land. He escaped conviction, but afterwards, having killed another physician—Dr. Andrew Randall—in the bar-room of the St. Nicholas Hotel, July 24, 1856, he was hanged by the Vigilance Committee one month later. When he was tried for the murder of Dr. Baldwin, Harry Bryne was District Attorney. In his closing speech for the prosecution, Bryne became very animated and severe. He expressed regret that no witness had been found who could give an exact recital of the circumstances and manner of the killing. "O, that Dr. Baldwin were here!" he exclaimed, looking fiercely at

Hetherington. "O that for one hour he could have revival from the grave, and tell us of the deep damnation of his taking off! O that I could call Dr. Baldwin!"

The court bailiff, who was usually half asleep, was roused from his lethargy by Bryne's ringing tones, and catching only the words "call Dr. Baldwin," promptly opened the door, went outside, and cried out: "Dr. Baldwin! Dr. Baldwin! Dr. Baldwin! Come into court!" Then stepping back into the court-room, he announced, "There's no answer!" A solemn stillness pervaded the chamber as the bailiff made this strange invocation to the grave, but when he returned and said, "There's no answer!" the scene presented an aspect so ludicrous that even Bryne, who had been interrupted in the heavy part of his work, had to cast the shadow from his brow, and join in the general glee.

Judge Ogden Hoffman has been on the bench of the United States District Court in San Francisco for *thirty-seven consecutive years!* He is of a distinguished family, son of a great lawyer, has a fine mind, received an excellent education, and, when we consider the length of his judicial tenure and the stirring period in which it has been cast, we see how large a theme the local historian must find in his career. I will only tell now one thing of him, and it will be at the expense of the Hon. A. P. Van Duzer. Mr. Van Duzer was then Assistant United States District Attorney, an efficient man in that place; indeed an efficient man at the bar, as well as a public speaker of no mean powers. Enjoying the respect of his professional brothers, he yet supplies them with amusement, at times, by his peculiarity of speech, manner and habit. Mr. Van Duzer was prosecuting before Judge Hoffman and a jury, a man indicted for selling unstamped matches. He seemed more than usually anxious to convict his man. His voice was loud, his sentences rolled out upon each other in pell-mell succession, his gesture was fierce, his eyes were on fire, his whole aspect inspired fear. Standing on tiptoe, with his right hand lifted on high, and his shirt collar unbuttoned, he reached the climax of his wrath: then, descending, as it were, from the empyrean to the dull earth again, he brought his clenched fist down upon the table with an energy that seemed to come from more than mortal power. The whole jury shuddered. The table cracked, the pyramid of books toppled over, hats were hurled to the floor, and the inkstands emptied their contents, as if in black wrath, into the lap of the defendant.

Just then, Judge Hoffman in a spirit of mercy, interfered. "Mr. Van Duzer, he said, "do you think that your argument has been helped by these extraordinary exploits? If you imagine that *noise* is an element of argument, I wish you would send out and get a Chinese gong; I would prefer to hear that." Mr. Van Duzer said he was through, and the case was given to the jury.

CHAPTER XIV.

Stephen J. Field—A Wonderful Life Story—Vicissitudes and Trials and “Hairbreadth ‘Scapes”—Collisions with the Bench—Expulsion from the Bar, and Reinstatement—Extraordinary Scenes in Court and Legislature—Duel with Judge Barbour—Relations with David C. Broderick—Legislative and Judicial Record—Amusing Incidents and Anecdotes, and a Capital Sensation—References to Leading Men of the Past and Present, with A Glance at the Early Marysville Bar.

It pleased my friend, Judge Robert Thompson, of San Francisco, after reading all of the preceding chapters, to say that their interest was heightened by variety of style, no two being alike in this respect. Whether or not the present narrative shall deserve to be included in this judgment, it will be found to signally eclipse all others in crisis and adventure.

The Rev. David D. Field, an eminent New England divine, who died about the year 1862, lived to see five sons attain enviable distinction. These were David Dudley Field, the great bar leader of New York, who is still in his professional harness at the age (in 1887) of eighty-two years; Cyrus West Field, who brought Europe and America to speaking terms with the electric current; Jonathan Field, once president of the Massachusetts State Senate; Stephen Johnson Field, the jurist, and Henry Martyn Field, who like his father, reached eminence in the pulpit, and who, in addition to his clerical duties, has for many years conducted and edited the New York Evangelist.

“One o’er another rose their heads in tiers,
Steps for their father’s honorable years.”

All of these are living except Jonathan. The stock is Puritan. It will be seen hereafter, however, how entirely exempted is Judge Field from all that is puritanic, using that word in its popular sense.

Judge Field was born in Haddam, Connecticut, November 4, 1816. His grandfathers on both sides were American army officers in the revolution. This reminds me of an expression which fell from a would-be statesman of San Francisco, on the stump, when trying to persuade the people to send him to Congress a second time. Laboring to convey the idea that his ancestors on both sides had fought in the Revolutionary army, he said: “My forefathers fought and bled in the Revolutionary war *on both* sides. They fought at Brandywine on one side, and at Yorktown on the other side.” He was not re-elected.

Rev. Dr. Field removed from Connecticut to Massachusetts and settled at Stockbridge, when his son Stephen was but three years old. Ten years later, Stephen accepted an invitation from Rev. Mr. Brewer and wife,

missionaries to the Levant, to go with them to the scene of their future labors. Mrs. Brewer was his sister, and her invitation being emphasized by the advice of his father and his eldest brother, he sailed with the missionary couple December 10, 1829, and arrived at Smyrna, February 5, 1829. He was abroad two and a half years, passing his time at Smyrna, Athens and other famous cities which had survived buried empires, visiting also the islands of the Grecian Archipelago. He acquired the modern Greek, and a fair knowledge of the French, Italian and Turkish tongues. His brother David had advised him to this course with a view to seeking a chair in an American university as Professor of Oriental Languages and Literature. He was in Smyrna when the city was visited by a fearful plague in 1831. In the fall of that year the cholera came upon the city. Mr. Brewer displayed signal courage and devotion in that trying period, going all over the place, visiting the sick, giving spiritual consolation and also the material help of medicines with which he kept his pockets filled. Young Stephen followed him wherever he went, also a medicine bearer.

Having been thrown in contact while abroad with people of many religious creeds and faiths, all of which presented to his eye evidences of sincerity in belief, as well as of humanity and true devotion, the boy returned home with his hold upon Puritanism entirely loosened. He had been taught, for so his parents thoroughly believed, that the New England Puritans had the only true religion. He now concluded that there was other food for the soul, and ever since, his early conclusion being strengthened by mature reflection, he has shown a lofty tolerance in religious matters. In tracing his career and noting the exceptional activity, courage and persistence which marked it, it would seem proper to call him a greater man, if not a greater lawyer, than his eminent elder brother. He has struggled against greater disadvantages, he has overcome more stupendous obstacles, he has accomplished more difficult undertakings, he has risen to a more enduring fame.

Entering Williams College in 1833, he won the highest honors, delivering the Greek oration in the junior exhibition, and the valedictory, upon his graduation in 1837. In the following spring he became a law student in his brother David's office in New York City. He was admitted to practice in 1841—the period of his study in law having been broken for a time by his service as a teacher in the Albany Female Academy. Even there he improved his spare moments and obtained assistance in his law studies from his brother's friend, John Van Buren, then Attorney General. As soon as admitted to the bar his brother received him as a partner, and they had a cordial business and brotherly union of seven years.

When the Mexican war broke out, David Dudley Field strongly advised his young brother to go to California. He, David, had made himself familiar

with the geography and even the political history of the Pacific coast, and had contributed to the *Democratic Review* two articles on the "Oregon Question." [See *Democratic Review* for June, 1845, and November of that year.] In conversation with his brother Stephen about the probable results of the war, he said: "If I were a young man I would go to San Francisco. I am satisfied that peace will never be concluded without our acquiring San Francisco harbor, and I believe a great city will spring up there." He was not aware, probably, that the foremost man of the nation (in political power), the President of the United States, was of the same opinion. I had it from Charles T. Botts, who came here from Virginia in 1849, and who had, before coming, an interview with President Polk, that the President declared privately that he would not consent to any treaty or peace between the United States and Mexico, and that all the influence of his high office would be exerted against a peace, unless it was a peace that gave us California.

Impressed, as he always was, with his brother's advice, the young lawyer determined to first make a visit to Europe. So, dissolving the partnership, he crossed the Atlantic in June, 1848. In December of that year in Paris, he heard of the discovery of gold in California. This country had come under the American flag. He at once concluded to visit it, but remained in Europe, sightseeing, for about nine months, then returned to New York. It was now October 1, 1849, and six weeks later he sailed for California by the way of Panama. He arrived in San Francisco December 28, 1849, just in time to be a pioneer. He got into lodgings with three dollars left him, two of which he was compelled to part with the next morning for the cheapest breakfast he could order.

He was buoyant in spirit, although out of money and in a new land, far distant from his home and kindred. The day was beautiful—in very midwinter—the air was exhilarating, everybody was active and happy, and the common salutation was, "What a glorious country!" Passing along Clay street, when near Kearny, he noticed a sign with very large letters, "Jonathan D. Stevenson. Gold Dust Bought and Sold Here." "Hello, here is good luck!" he thought. His brother David had given him a promissory note which he held against Col. Stevenson for \$350, stating that he understood the Colonel had become rich in California, and if this were true, to ask him to pay the note. Taking the piece of paper from his otherwise empty pocketbook, he entered the place where gold dust was bought and sold. He was recognized and cordially received. In talking about the "glorious country," the Colonel let fall the welcome information that he had made \$200,000. The note was presented and paid with interest in full—\$440. [Colonel Stevenson is still living in San Francisco, active and in good health, practicing law. After many sweeping reverses of fortune, he is again well to do. He is eighty-eight years old.]

Hiring a room, about 15x20, at the corner of Montgomery and Clay streets, our resolute pioneer put up his shingle. It cost him \$300, the bulk of his little capital, to pay one month's rent. This was money thrown away. He received no client callers, except one man, who paid him eight dollars for drawing a deed. He tells us that, in fact, he was in no frame of mind for business, being so excited by the stirring life around him that he passed most of his time on the streets and in saloons, listening to the stories of people from the mines. San Francisco was given a short trial. In less than three weeks from the time he landed here the young lawyer took the steamboat for Sacramento. His objective point was the new town of Vernon, a little further up the river, at which point he had been advised to enter upon an active practice of law by Simmons, Hutchinson & Co., of San Francisco, to which firm he had brought letters of introduction. Finding that Vernon consisted of a single shanty surrounded by a vast expanse of water—the country was then flooded—he pushed on to Nye's Ranch, near the mouth of the Feather river. There he found a bustling camp of several hundred men, and concluded to pitch his tent. An auctioneer was selling town lots. The lawyer asked him the price. The lots were 80x160, the same as in Sacramento, and the uniform price was \$250. "Suppose a man puts his name down and afterwards does not want the lots?" asked the lawyer. "Oh, you need not take them if you don't want them," replied the auctioneer. "I took him at his word," said the newcomer afterwards; "I wrote my name down for sixty-five lots, aggregating in price \$16,250."

He had only about \$20 left of what Colonel Stevenson had paid him, but he became at once the lion of the hour, the capitalist of the community. The proprietors of the land who had just bought it from General Sutter, but who had not yet got their deed, showed the newly arrived capitalist marked attention. Two of their number were French gentlemen, and finding their new acquaintance spoke their tongue, they became the more appreciative.

From the beauty and healthfulness of the spot, and its admirable location, our far-seeing friend was satisfied as to its future. Messieurs Covillaud and Sicard, the two French gentlemen named, became his friends and clients, and he wrote for them the first deed or law paper ever recorded affecting property in Marysville. General Sutter, then living at Hock Farm, six miles distant, signed this deed, which conveyed several leagues of land.

So the attorney went to work at once. On the next day after his arrival, in the evening, a public meeting was held to decide if a town government should be established. It was decided in the affirmative after a speech by Field, predicting a brilliant future for the place.

Who named Marysville? Women will tell fibs as well as men. I have been assured by several of the sex that the beautiful city where the Yuba

and Feather meet, was named after their mothers or their aunts. They had better not tell Judge Field so, for he knows all about it. On January 18, 1850, the people of the new town, then called by some Nye's Ranch, by others Yubaville, established a town government, electing an Ayuntamiento, or Town Council, First and Second Alcaldes and a Marshal. Judge Field was elected First Alcalde by a majority of nine votes. It was urged against him that he was a newcomer. He had been there only three days, while his opponent had been there nine days. This opponent was Mr. C. B. Dodson, who a few years ago was still living at Geneva, Illinois. In the evening another public meeting was held to hear the result of the election. It was resolved at that gathering to give the new town a name. The competing cognomens were "Yubafield," "Yubaville," and "Circumdoro." But at the last moment an old man arose, and said that there was an American lady in the place, the wife of one of the proprietors (the French gentleman, Covillaud). Her name was Mary, and in her honor he moved that the place be called "Marysville." This was at once agreed to amid hearty cheers, and with not one dissenting voice. Mrs. Covillaud was one of the survivors of the Donner party, whose frightful sufferings in the Sierra Nevada mountains, in the winter of 1846-7, must be still widely remembered.

As the constitution of the State had gone into effect, although the State had not been admitted into the Union, everybody recognized the instrument and a session of the legislature was then sitting under its provisions, and had just elected a full set of State officers. To make his calling and election sure, the new Alcalde obtained from Governor Burnett a commission as Justice of the Peace, the two offices amounting to one and the same thing in jurisdiction, except that the duties of Justice of the Peace were accurately defined.

The first case that he tried deserves notice, as it presents a scene in striking contrast with the exalted station of a Justice of the United States Supreme Court, to which our Alcalde was destined to attain. He had no courtroom for a short time and tried this first case in the street. Two men met him, one leading a horse; the one holding the halter said: "Mr. Alcalde, we both claim this horse, and want you to decide who is entitled to it." The Judge administered an oath to the strangers and examined them fully. He was lawyer for both of them and Judge between them. The questions being all put and answered, the Judge said: "It is very plain, gentlemen, that, as between you two, this man, (pointing to one of them) owns the horse." "But," said the loser, "the bridle belongs to me. Does he take the bridle, too?" "Oh, no, the bridle is another matter," replied the Judge. Then the owner of the bridle, who had lost the animal, asked his adversary: "How much will you take for the horse?" Two hundred and fifty dollars," was the prompt answer. The two agreed then and there, and the purchaser

engaged the Alcalde to draw a bill of sale, and he wanted one that would "stick." The paper was given, charges paid, and both parties left apparently satisfied. The fees were an ounce of gold dust (\$16) for trying the case and an ounce for the bill of sale.

A few weeks after his arrival at Marysville, he was very glad that he had put his name down on that auctioneer's list for sixty-five lots—and he was very glad that the auctioneer had not treated it as a joke. Within ninety days he had sold over \$25,000 worth of real estate, and had a good majority of his lots left. He had brought from San Francisco frame and zinc houses, which yielded a rental of over \$1,000 a month. His fees as Alcalde were large, and at one time, not to mention his real estate, he had \$14,000 in gold dust of his own in his safe. About that time he employed as a clerk George C. Gorham, then 17 years of age. He found Gorham a quick youth and a trusty agent, and has been his faithful friend ever since.

Leaving the office of Alcalde, Judge Field had just entered actively upon the practice of law when he was nominated for the Assembly. He never knew who put him in the field, but he found himself in, and he made a memorable fight. He had had a rupture with the District Judge, William R. Turner, which has had no parallel in controversies between bench and bar, and which will be noticed hereafter. As a candidate for the legislature he openly announced that his purpose was to reform the judiciary and to have Judge Turner removed from the bench of that district. Judge Turner, in return, threatened to drive the would-be lawmaker into the Yuba river. Yuba county then embraced, in addition to its present area, the present counties of Nevada and Sierra. Many interesting incidents of this animated canvass are preserved. At one place in the mines he arrived on the scene just in time to save an innocent man from being hanged. He treated the lynch jury many times to the best wines and cigars that could be got, and appealed to their hearts while tickling their appetites.

He, being an independent candidate, had to bear all the expenses of the campaign, which were very heavy. Here is the way he entertained the boys in Downieville and what he had to pay for it. This bill was only one of a large number sent to him afterwards at his home in Marysville :

MR. S. J. FIELD,

TO ORLEANS HOUSE, DR.

To 460 drinks.....	\$230 00
275 cigars.....	68 75
	\$298 75

Downieville, October 9, 1850.

[Indorsed,]

We hereby certify that the within amount is correct.

P. L. MOORE,
WM. S. SPEAR.

Received payment of the within bill from Stephen J. Field.

J STRATMAN.

October 14, 1850.

He was elected by a large majority. Immediately he commenced the preparation of a bill relating to the judiciary. The legislature met at San Jose the first Monday in January, 1851. Judge Field was appointed on the Judiciary Committee. To this committee he submitted his bill, and they approving it, it became a law. Its essential features have ever since been preserved, and are now to be found in our Code of Civil Procedure. Besides creating eleven judicial districts, it defines the jurisdiction and powers of every judicial officer in the State, from Supreme Judge down to Justice of the Peace. He also introduced a bill dividing the county of Trinity, and creating that of Klamath, and another bill dividing the county of Yuba and creating that of Nevada, and not forgetting his old enemy (and the sequel will show what cause he had to be mindful of him), he secured the formation of a new Eighth district out of Trinity and Klamath, and had the counties of Yuba, Sutter and Nevada united into a Tenth Judicial district. So Judge Turner, as Judge of the Eighth Judicial district, had to change his territorial base, and go to Trinity and Klamath, then very sparsely settled counties. Not yet feeling that he had got even with his old foe, he presented petitions from many of the leading citizens of Yuba county, praying for Turner's impeachment and removal from office, on the grounds of incompetency, ignorance, and arbitrary and tyrannical conduct. As an impeachment trial would necessitate a considerable extension of the session, and the members generally desired to get home, the proposed impeachment was indefinitely postponed by a majority of three votes, Judge Field not voting.

Judge Field introduced and secured the passage of the California Practice Act, now known as the Code of Civil Procedure. He adapted it from the New York Code of that name. We are in like manner indebted to him for our Criminal Practice, now our Penal Code. In this work he altered and reconstructed over three hundred sections of the New York Codes and added over one hundred new sections.

Of course, our Civil Procedure and Penal Codes have been greatly amplified since they left his hands, in the shape of the Civil and Criminal Practice acts. The State of Nevada and the surrounding territories adopted these laws regulating civil and criminal procedure before they were translated and elaborated into our own Codes.

As an illustration of the respect which Judge Field exacted from his co-legislators, on account of his clearness of judgment and constant industry, it may be stated that the Criminal Practice act, as introduced by him, was never read before the Legislature. The rules were suspended, and the bill read by its title and passed. It narrowly escaped hostile action from the Governor. It comprised over six hundred sections, and on the last day of the session the Governor told Judge Field that he could not sign it without reading it, and it was too late for him to do that. The Judge urged him to sign it, representing

that it was essential to the harmonious working of laws already passed. "You say it is all right?" asked the Governor. "Yes," answered the Judge and the signature was given which made it a law.

The Civil Practice act provided most liberally, and in pursuance thereof the Civil Procedure Code now provides most liberally, for exempting certain property from sale or seizure for debt. It exempted furniture and books of \$100 value; necessary wearing apparel, and provisions for one month; farming utensils; two oxen, two horses (or two mules), and their harness, and one cart or wagon, with one month's food for such animals; a mechanic's tools, the instruments and chests of a surgeon, physician, surveyor and dentist, and their professional library; lawyers' libraries; miners' rockers, spades, wheelbarrows, furniture, etc., and one month's provisions; two oxen, two horses (or two mules) and their harness, and one cart or wagon, by the use of which a cartman, teamster or other laborer habitually earns his living; and all arms and accoutrements required by law to be kept by any person. But no article should be exempt from an execution issued on a judgment recovered for its price, or upon a mortgage thereon.

"I never could appreciate," said Judge Field, "the wisdom of that legislation which would allow a poor debtor to be stripped of all needed articles of his household, and of the implements by which alone he could earn the means of supporting himself and family, and of ultimately discharging his obligations. It has always seemed to me that an exemption from forced sale of a limited amount of household and kitchen furniture of the debtor, and of the implements used in his trade or profession, was not only the dictate of humanity, but of sound policy." The Civil Practice act also contained the most important legislation ever passed in behalf of the mining interest—namely, a provision that in actions respecting claims, the courts should recognize the customs, rules and usages established by the miners themselves, when not in conflict with the constitution and laws.

Our legislator also secured the passage of an act making it impossible for judges to disbar attorneys without a hearing. This was, no doubt suggested to him by his war with Judge Turner. He also drew the charters of the cities of Marysville, Nevada and Monterey. His other legislative work was important. When the legislature adjourned, he tells us, he was a ruined man in a pecuniary sense. He could hardly pay his passage. After his expulsion from the bar by Judge Turner, he commenced speculation, and sowing to the wind he reaped whirlwinds. When he returned to the city which he had practically founded, he had only a few cents in his pocket, and he was minus all his property and in debt to the depth of \$18,000. No old Californian will be surprised at this. It was in keeping with the average Californian's experience. "My dear Mr. Peck," he said to the proprietor of the United States Hotel (whom he could have bought out twenty times over, one year before),

"will you trust me for two weeks' board?" Whether from innate nobility or motives of business policy, I do not know, but at any rate Peck answered "Yes;" and he added, "for as long as you want." And Peck sent a man and had the law-maker's trunks brought from the steamboat, and made him at home.

Now in a little room, with a pine table and a cane bottom sofa, and the bills which had just passed the legislature and the statutes of the previous session for a library, thus humbly, thus bravely, did he take again to his profession. There was an unfinished, unfurnished loft over his office, in which he slept. The cot he slept upon he bought on credit. On this he spread a pair of blankets. His pillow was his valise. His washstand was a chair without a back. He managed to secure a tin basin, a pail, a piece of soap, a toothbrush, a comb, and a few towels. He was his own hewer of wood and drawer of water.

Just as he was about to re-enter actively on law practice, Judge Field's name was brought before the public again as a candidate for the State Senate. In convention he was beaten for the nomination by two votes. Accordingly, he resumed his seat on that cane-bottomed sofa beside his little pine table. He did not use that rude furniture long, nor did he pass many nights in the loft. Soon the luxury of fine apartments for both office and lodgings was attained. Within two and a half years he paid off all his indebtedness, which, with interest, exceeded \$38,000. His great success drew him closer to his profession, and he resisted every suggestion or invitation to run for office. Marysville had grown into an attractive and busy city of twelve or fifteen thousand people, and being at the head of navigation, was the emporium whence a vast country drew its supplies. It had an able bar. Judge Field practiced in Marysville, and also in all northern California. For some years he had the most lucrative practice in the State, outside of San Francisco. I have examined all the California Reports, and find that during the period of about seven years—between his leaving the legislature and his going on our Supreme bench—he had more causes in our Supreme Court than any other lawyer. And his success on appeal was almost phenomenal. He was successful in nine out of every ten cases. Wherever the Reports show Stephen J. Field was for the appellant, the judgment was reversed, and where he was for the respondent, the judgment was affirmed—that is, that was the rule, and the exceptions were few.

Among Judge Field's associates at the Marysville bar during this period were Richard S. Mesick, afterwards District Judge in Storey County, Nevada, now a rich lawyer in quiet practice in San Francisco; Chas H. Bryan, who died in Virginia City, Nev.—he was once on our Supreme bench; Jessie O. Goodwin, afterwards Speaker of the Assembly, District Attorney, and State Senator; Gabriel N. Swezy, afterwards in both branches of the Legislature;

General William Walker, the "grey-eyed man of destiny," the foremost filibuster of all the world; John V. Berry, whom a druggist poisoned by mistake; E. D. Wheeler, since State Senator, and District Judge in San Francisco, now residing there; T. B. Reardon, since District Judge in Nevada county, who (sitting for Judge Dwinelle) tried Mrs. Laura Fair, on her second trial, and who died at Oroville; Isaac S. Belcher, since District Judge and Supreme Judge, and now a Supreme Court Commissioner; E. C. Marshall, since a member of Congress, and later Attorney General, and a brilliant member of the bar, and at least fifty others, including Charles E. Filkins, Charles Lindley, Henry P. Haun, N. E. Whitesides, since speaker of the Assembly, F. L. Hatch, George Rowe, William C. Belcher, Charles E. DeLong, afterward minister to Japan, and Henry K. Mitchell, who has now long been prominent in law and politics in Nevada.

William R. Turner, who had just been appointed Judge of the District Court of the Eighth Judicial District, which embraced Yuba County, opened his court in Marysville on the first Monday in June, 1850. Among those who waited upon him a few days before, to pay their respects, was Stephen J. Field, who handed him his latest copies of the New York *Evening Post*, which journal was then the organ of the Freesoil party. From this fact Judge Turner, who had lived in Texas, and was a pro-slavery man of narrow mind and violent temper, inferred that his northern visitor was an Abolitionist, although he was in error on this as on many other points about him—all of which he found out in time. The New York lawyer was about to revisit his old home, leaving his affairs in a very prosperous state, when his friend, General Sutter, insisted that he should postpone his departure long enough to be his counsel and assist his attorney in the case of Cameron against Sutter, just instituted in Judge Turner's court. The request was complied with, and during the first week of Court the case of Cameron vs. Sutter was called. Judge Field's associate made a preliminary motion, which Judge Turner denied. Jessie O. Goodwin, who sat near, passed Judge Field the Practice act, and pointed out a section bearing on the question. Judge Field arose, and asked permission to read the section. Judge Turner replied: "The court knows the law; the mind of the court is made up; take your seat, sir." Judge Field was amazed, but said, respectfully, that he excepted and would appeal. Judge Turner then, in loud and angry tones, said: "Fine that gentleman \$200." Judge Field's next was, "Very well," or "Very well, sir." Judge Turner immediately added, "I fine him \$300, and commit him to the custody of the Sheriff for eight hours." Another quiet, "Very well," came from Judge Field. Then Judge Turner exclaimed, excitedly: "I fine him four hundred dollars and commit him twelve hours." Judge Field then remarked that it was his right by statute to appeal from any order of his honor, and that it was no contempt of court to give notice of an

exception or an appeal, and he asked the members of the bar present if it could be so regarded. Judge Field had better tell the rest himself:

Upon my statement, he flew into a perfect rage, and in a loud and boisterous tone cried out, "I fine him five hundred dollars and commit him twenty-four hours—forty-eight hours—turn him out of court—subpoena a posse—subpoena me." I left the courtroom. The attorney in the case accompanied me, and we were followed by the deputy sheriff. After going a few steps we met the coroner, to whom the deputy sheriff transferred me. * * The attorney, who was much exasperated at the conduct of the judge, said to me, as we met the coroner, "Never mind what the judge does; he is an old fool." I replied, "Yes, he is an old jackass." This was said in an ordinary conversational tone; but a Captain Powers, with whom Turner boarded, happened to hear it, and running to the courthouse and opening the door he hallooed out: "Judge Turner! Oh, Judge Turner! Judge Field says you are an old jackass." A shout followed and the judge seemed puzzled whether or not he should send an officer after me, or punish his excitable friend for repeating my language. Toward evening the deputy sheriff met the judge who asked him what he had done with me. The deputy answered that I had gone to my office and was still there. The judge said: "Go and put him under lock and key, and if necessary put him in irons." The deputy came to me and said: "The judge has sent me to put you under lock and key; let me turn the key upon you in your own office."

Asking the deputy to show his warrant of commitment, and finding that he had none, the lawyer became indignant, and told the officer to go away. Saying, "I will lock the door anyway," the officer did so and retired. A writ of habeas corpus was immediately sued out and forthwith executed, and that same evening the County Judge, Henry P. Haun, afterwards United States Senator, promptly discharged the lawyer, there being no warrant in the officer's hands. While Judge Field was treating a crowd of excited friends that night—which cost him \$290—Judge Turner came on the scene, on fire with fury, and applied vile and obscene epithets to the County Judge, saying that he would teach "that fellow" that he was an inferior judge. The wrathful magistrate was hung in effigy that night on the public plaza. He said this was Judge Field's work—another mistake. The story of this extraordinary "contempt" case is a long one, but I can reduce it and not spoil it. On the day when the court next opened, Judge Turner made an order that Judge Field be expelled from the bar for suing out the habeas corpus; also expelling Samuel B. Mulford and Jesse O. Goodwin for being witnesses on the return—on the pretense that they had, all three, "vilified the court and denounced its proceedings." He also fined the County Judge \$50 and ordered him imprisoned forty-eight hours for discharging Judge Field from arrest. The County Judge paid his fine and left the courtroom, and the Sheriff took Judge Field into custody. The latter immediately sued out another writ of habeas corpus, and while before Judge Haun and his associates of the Court of Sessions arguing for his discharge, the sheriff entered and declared his intention of taking Judge Field from the courtroom

and Judge Haun *from the bench*, and putting both in confinement in pursuance of Judge Turner's order.

There was an extraordinary scene in Court. Judge Haun told the sheriff that the Court of Sessions was holding its regular term; that he (the sheriff), was violating the law, and that the Court must not be disturbed in its proceedings. The sheriff returned to Judge Turner and reported the situation. Judge Turner ordered a posse to be summoned, asking those in the courtroom to serve on it, and directed the sheriff to take Judge Haun and lawyer Field by force; and, if necessary, to put Judge Haun in irons—to handcuff him. The sheriff and his posse soon rushed into the Court of Sessions, forced the attorney from the courtroom and were just about to give the unexampled exhibition of tearing a magistrate from his seat, when Judge Haun stepped to a closet, and drew from it a navy revolver, cocked it and leveling it at the sheriff, declared he would kill him if he approached nearer. He also fined the sheriff \$200 for contempt of Court, appointed a temporary bailiff, and directed the latter to eject the sheriff and his party from the chamber. The new bailiff acted promptly, the bystanders responded to his call, and the intruders withdrew. Judge Haun then laid his revolver on his desk, enquired if there was any further business, and there being none he adjourned the court. To further curtail the account, it may be stated that before the Supreme Court, Judge Field was successful as usual. That tribunal entirely undid Judge Turner's work. His orders imposing fines were reversed, and Messrs. Field, Goodwin and Mulford were restored to the bar. Judge Turner refused to obey the mandate of the Supreme Court for the restoration of the attorneys. He issued an address to the public, to which the three attorneys and five others replied, the reply declaring that Judge Turner was a man of depraved tastes, of vulgar habits, of an ungovernable temper, reckless of truth when his passions were excited, and grossly incompetent.

Judge Turner then threatened to publicly insult Judge Field, and then to shoot him if he resented it. Judge Field repaired to San Francisco and took counsel of Judge Nathaniel Bennett. The latter gave some advice, which if acted on, would hardly have tended to promote Judge Turner's well being. Being unused to arms, and reared to do without them, Judge Field did not like to "heel" himself, to use the word of that day, but he was told and he believed that his life depended on it, and accordingly he purchased a pair of revolvers, had a sack coat made with pockets in which the weapons could lie and be discharged without taking them out, and by practice made himself a good shot. Then he sent by Ira A. Eaton, a message to Judge Turner, which was substantially, "I desire no trouble with you, but I will not avoid you; I have heard of your threats, and if you attack me or come at me in a threatening manner I will kill you." They often met, in many places, but no words

passed. Judge Field when he saw his foe always grasped his pocketed arms and kept a sharp lookout. He says he felt that he was in great danger, but that after a time there was a sort of fascination in this feeling. He does not think that Judge Turner would have shot him down deliberately, when sober, but that, when in drink, and in presence of lawless crowds who heard his threats, it would have taken but little to urge him on.

All this happened, be it remembered, six or seven months before the legislature, through Judge Field's influence, removed Judge Turner to the snows of Trinity. In the meantime the disbarred attorney was ruined in business. He was not permitted to practice in the District Court, despite the Supreme Court mandate, and if he had been, his relations with the court were such as to keep clients away from him. As appears above, he returned from the legislature in debt.

Why did not the Supreme Court compel obedience to its mandate? It happened thus. The disbarred attorneys having been admitted to the Supreme Court, which entitled them to practice in all the courts of the State, Judge Turner made an order for them to show cause why they should not be again expelled. They showed cause enough, but it was not received, and a second order of expulsion was entered. From his very position he was enabled to keep the attorneys lively, and for a time to ruin their business. Another mandate was obtained from the Supreme Court for their reinstatement. They then asked for Judge Turner's punishment, but the Supreme Court declined to punish him on the grounds that he had recognized the first mandate by making a second order of expulsion, after an order to show cause, etc. Very nice point, eh?

Judge Turner, after being removed to Trinity, served out his term, and at its close was a candidate for re-election. His opponent being declared elected by one vote, he contested, and it went to the Supreme Court. Judge Field was then on the latter bench, but he did not participate in the hearing or decision, and Justices Terry and Baldwin gave the office to Turner. The latter then sent a friend to Judge Field to inquire if he would be reconciled. Judge Field said no; that the world was wide enough for both; and each would go his own way. The next day Judge Turner stationed himself where Judge Field had to pass to go into court, and as his old adversary approached he called out: "I am now at peace with all the world; if there is any man who feels that I have done him an injury, I am ready to make amends. Judge Field looked at him a moment, then passed on. The same thing occurred the next day. That was the last time the two judges ever met. Judge Turner served out his term and was again elected. In 1867 Mr. C. Westmoreland, member of the Assembly from Trinity, offered resolutions looking to Judge Turner's impeachment for high crimes and misdemeanors. Mr. West-

moreland made a speech severely arraigning the Judge for his many acts of tyranny, and the most shameless conduct. The resolutions were adopted, but before the appointed committee took action, Judge Turner resigned, and not long afterward died.

At the end of this extraordinary and protracted struggle, Judge Field found that his triumph had cost him his fortune and his business. Yet his reputation as a lawyer had increased, and as soon as it was seen that he had fair play at court his practice again became large. Judge Turner being removed to another district, and a new (Tenth) being created, comprising Yuba, Nevada, and Sutter counties, the Governor commissioned Gordon N. Mott Judge of the new court. Judge Mott was the personal and political friend of Judge Field, who urged him for the place. He died in 1887, at quite an advanced age, in San Francisco.

Judge Field now had clear sailing. The County, District and Supreme Courts all respected him highly, and all concurred in the popular judgment that he had the first legal mind of that day, in his section, if not in the State. But his career was again to be broken—again was he to collide with the bench. Judge Mott had been appointed to hold until the next election, which only gave him about ten months on the bench. William T. Barbour was elected to succeed him. Judge Mott refused to vacate his seat, on the ground that under the law his successor could not be chosen until the election in the fall of 1852. Judge Field endorsed this view, and an agreed case between Judges Mott and Barbour being presented to the Supreme Court, Judge Field argued it for the former. Judge Barbour prevailed, and, taking offense at Judge Field for his support of Judge Mott, he determined upon revenge. He openly declared his enmity to Judge Field, who was the leading practitioner! How we have advanced since that day! The period for which Judge Barbour had been elected was the remainder of Judge Turner's term, Judge Mott having been appointed to serve out a part of the same term until an election was held. Judge Barbour's remainder was one year. He was then elected for a full term of six years. Judge Field had opposed him with all his influence, and so widened the breach between them. Upon being informed that Judge Barbour had made some bitterly vituperative remarks about him, Judge Field waited on him and asked him substantially: "If so, why so?" He was not daunted by the prospect of another long war with the court, and he did not propose to be compelled to take his shingle to some other part of the State. As before, so then, and so throughout his career, his physical and moral courage was and has been little less conspicuous than his legal talent.

At the meeting between him and Judge Barbour hard words passed. Judge Barbour refused to explain, and verbally invited him to a settlement "in the usual way among gentlemen." This was promptly accepted by

Judge Field, who then and there named Judge Mott as his friend. In half an hour Charles S. Fairfax, as the friend of Judge Barbour, waited on Judge Mott to arrange for a hostile meeting between their principals. Mr. Fairfax insisted that Judge Field had given the challenge, and as there was no writing to throw light on the point, the seconds could not agree. Judge Field directed Judge Mott to waive the point.

At several stages in this controversy it threatened to culminate in tragedy, but, on the whole, as we look back, it presents a ludicrous aspect. Having admitted, for argument's sake, that he was the challenging party, Judge Field had to let his adversary choose the weapons and the time and place of meeting. Mr. Fairfax stated that the time was that evening, the place a certain room, twenty feet square, the weapons Colt's revolvers and bowieknives. Thus armed, the principals were to be placed at opposite sides of the room, face to the wall, and at the word, they were to turn and fire, then advance and finish the conflict with their knives. Judge Mott said he would not consent to these terms, because they were unusual, unprecedented and barbarous. Mr. Fairfax admitted it, but said he was following his principal's directions. He then asked Judge Barbour to modify them, but that gentleman refused. On receiving Judge Mott's report, Judge Field said that Judge Barbour was a coward, and would not fight at all; that his terms were those of a bully playing a game of bluff. He told Judge Mott to accept the terms by all means. This being done, Judge Barbour said he would waive the bowie knives, and he soon followed this by a second message, that it would not do to fight in the room agreed on, as the firing would attract a crowd. All his modifications were accepted, and the parties "met" the next morning in this comic way: Two stagecoaches were to leave Marysville for Sacramento as usual. Judge Barbour was to take one of them and Judge Field was to go in a private conveyance, and both were to alight at a specified point, and walk to a retired spot close by and have it out. Judge Field, accompanied by Judge Mott, reached the appointed place first and waited for the stages. Soon one arrived and stopped, but no person alighted. In a few minutes the second stage arrived, stopped, and Judge Barbour and Mr. Fairfax got out. Judge Barbour then exclaimed that he was a judicial officer, and as such he could not engage in a duel. I now quote Judge Field: "At the same time he would take occasion to say that he would protect himself, and, if assaulted, would kill the assailant. With these words, leaving Fairfax standing where he was, he walked over to the first stage, and, mounting rode on to Sacramento. Seeing Fairfax standing alone on the ground, I sent word that I would be happy to give him a place in my carriage—an invitation which he accepted, and we then drove to Nicolaus, where we breakfasted, and thence returned to Marysville."

Judge Mott, in a pleasant talk of old times I had with him in 1882, said

that this whole affair was still quite fresh in his memory; that Judge Barbour, on getting out of his coach, declared, excitedly, that he was going forward to the other one, and he called on the passengers to "take notice if that damned rascal (pointing to Judge Field) attacked him, he would kill him." Stepping in front of Judge Barbour, Judge Mott said: "Hold! Judge Field will not attack you, sir." He also told Mr. Fairfax that this was strange conduct on the part of his principal. Mr. Fairfax, astonished and mortified, joined Judges Field and Mott, as before stated. Judge Mott further said that while he was trying to get Judge Barbour to change the first terms of the duel, he determined, without consulting Judge Field, to take the latter's place in the fight if Judge Barbour insisted on the bowie knives, because the difficulty was on his (Judge Mott's) account. The terms, as finally agreed on, were that the parties were to be stationed one hundred yards apart, each armed with as many Colt's revolvers as he chose to carry, to fire upon each other at the word, and to advance at pleasure and finish the conflict. Probably the original distance did not scare Judge Barbour much, but it was "advancing at pleasure and finishing the conflict" that made him remember his judicial position.

Some sharp squibs appeared in the Marysville papers at Judge Barbour's expense. He demanded the name of the author of one of them. The editor would not reveal it, but Judge Field, hearing of the demand, told the editor to give his (Judge Field's) name as the author, which was done. Next morning, while the lawyer was in front of his office picking up chips to make a fire, Judge Barbour came suddenly upon him, placed a cocked navy revolver near his head, and said "Draw and defend yourself!" Judge Field replied, "You infernal scoundrel, you cowardly assassin! You come behind my back, and put your revolver to my head and tell me to draw! You haven't the courage to shoot! Shoot and bed—d." Judge Barbour then walked away. Perhaps he again recollected that he was a Judge.

"For a long time afterwards," says Judge Field, "he expressed his bitterness towards me in every possible way. He did not take Turner's plan of expelling me from the bar; but he manifested his feelings by adverse rulings. In such cases, however, I generally took an appeal to the Supreme Court, and in nearly all of them procured a reversal. The result was that he suddenly changed his conduct and commenced ruling the other way. While this was his policy there was hardly any position I could take in which he did not rule in my favor. At last I became alarmed, lest I should lose my cases in the appellate court by winning them before him."

This was in 1853. In 1854 Judge Barbour asked Judge Field to be reconciled to him. The latter consented, but said he did not want to hear any explanations for past conduct. Soon, however, Judge Barbour commenced explaining and regretting, etc., and in 1856 he wrote Judge Field a letter of

regret for past actions, "trusting that this explanation may be satisfactory." He died in Virginia, Nevada, about 1866.

Judge Field had personal and political relations of close friendship with David C. Broderick. This sprang from another personal quarrel. Judge Field's address, on moving Judge Turner's impeachment in the legislature of 1851, called forth a savage and abusive reply from B. F. Moore, assemblyman from Tuolumne county. In rising to speak, Mr. Moore opened his drawer, took out two revolvers, cocked them and laid them in the open drawer before him! He interspersed his offensive remarks with the declaration that he was responsible for what he said, there or anywhere. Judge Field wrote him a note demanding an apology or "satisfaction," and asked Samuel A. Merritt, of Mariposa, to deliver it, but that gentleman declined on account of the constitutional provision against dueling. Judge Field said that this provision of the constitution was not self-operative, and there was no statute on the subject. He had about concluded that he could not find a proper friend to act as his second, when one night he met David C. Broderick, writing at his desk in the senate chamber. They barely knew each other, but Broderick, who was then President pro tem. of the senate, looked up and said, "Why, Judge, (they called him judge then, because he had been Alcalde) you don't look well; what is the matter?" Judge Field answered that he had not a friend in the world. "What is it that worries you?" asked Broderick. The particulars were given him in full. On hearing them Broderick said: "My dear Field, I will be your friend in this matter; go at once and write a note to Moore, and I will deliver it myself." The note was soon in Broderick's hands. He presented it to Moore, who said that he expected to be a candidate for Congress, and on that account could not fight a duel, but he was willing to meet Judge Field at any time and place. Broderick replied that a street fight was not exactly the thing among gentlemen; but, if that was the best that Moore could do, he should be accommodated. An hour later Moore concluded to fight a duel. He named Drury P. Baldwin as his second. Broderick, after satisfying himself by experiment that Judge Field was a good shot, called on Baldwin for an answer to the hostile note. Baldwin said Moore had concluded to do nothing further in the matter. "Then," said Broderick, "as soon as the House meets Judge Field will rise in his seat, and refer to the attack on him, and to the language of Moore, that he held himself responsible for what he said and state that respect for the dignity of the house had prevented him from replying to the attack at the time in the terms it deserved; that he had since demanded satisfaction of Moore for his language, and that Moore had refused to respond, and will thereupon pronounce him a liar and a coward."

"Then Judge Field will get shot in his seat," said Baldwin.

"In that case there will be others shot, too," said Broderick.

Broderick then told his principal of this interview, and asked, "Will you act as I said you would?" "Most certainly; never fear for me," was the reply. When the house opened, Judge Field was at his desk. Near him Broderick was seated, surrounded by eight or nine of the latter's personal friends, armed and ready. The journal being read, Judge Field and Mr. Moore rose and said at the same time, "Mr. Speaker." The Speaker recognized Mr. Moore, and Judge Field sat down. Mr. Moore then read a written apology, which General John C. Addison had prepared and prevailed upon him to read. It settled the business.

The session of the legislature at which occurred the scenes just described, terminated in May, 1851. Before returning to Marysville, Judge Field spent some days in San Francisco, and during his stay he visited Broderick several times at the latter's hotel, the Union, at the northerly corner of Kearny and Merchant streets, now a part of the Old City Hall. (The old gilt letters, big and bright, "Union," may yet be seen on the Kearny street front, after a lapse of thirty-six years.) On one occasion, when the two friends were at the bar of the hotel, taking a glass of wine, Broderick suddenly threw himself before Judge Field and grasping him, pushed him out of the saloon into an adjoining room. As soon as he could get his breath, Judge Field said, "What does this mean, Mr. Broderick?" Broderick then explained his sudden and violent movement. As they stood at the bar, "Vi" (Vicessimus) Turner, a brother of Judge Field's old enemy, represented as a desperate man, entered the saloon and, seeing the Judge, threw back his Spanish cloak, drew a revolver and leveled it at him. Broderick saw the act, quickly interposed his own body, and the man put up his pistol and withdrew. Oh, those were the days—for the men who were spoiling for a fight! Vi Turner was not only not arrested but the affair only caused a three minutes' flutter. The friendship between Judge Field and Mr. Broderick was broken when Buchanan and Douglas became estranged. Mr. Broderick opposed Judge Field's elevation to the Supreme Bench. After that event they never conversed together; "but I could never forget his generous conduct," says Judge Field, "and for his sad death there was no more sincere mourner than I."

The Broderick-Terry duel recurs to mind, just here, by reason of Judge Field's relations with both combatants. His friendship for Broderick has just been dwelt upon. With Judge Terry he was associated two years on the Supreme bench of the State. The celebrated duel took place in September, 1859. Judge Field was then visiting his Eastern friends. "I was absent from the State at the time," says Judge Field, "or I should have exerted all the power I possessed by virtue of my office to put a stop to the duel. I would have held both the combatants to keep the peace under bonds of so large an amount as to have made them hesitate about taking further steps; and, in the meantime, I should have set all my energies to work, and called

others to my aid, to bring about a reconciliation. I believe I should have adjusted the difficulty."

In the fall of 1857 Judge Field was elected, as the Democratic nominee, a Justice of the State Supreme Court. In the canvass before the people he had two opponents—his old friend Nathaniel Bennett, Republican, and J. H. Ralston, American, or Knownothing. He had struck that "tide in the affairs of men, which, taken at the flood, leads on to fortune." His majority over Judge Bennett was 36,272; over Judge Ralston, 36,148; over both, 17,204. In September, 1857, immediately after his election, and about three months before his term was to commence, for which he had been chosen, Hon. Hugh C. Murray, Chief Justice, died, and Hon. Peter H. Burnett, Associate Justice, was appointed Chief Justice. To the vacancy thus caused by Judge Murray's death and Judge Burnett's advancement, Judge Field was appointed by Gov. J. Neely Johnson, an old Whig and Knownothing opponent of his. He accepted and took his seat on the Supreme bench, October 13, 1857, nearly three months earlier than he had anticipated. When he took his seat upon the bench—and I distinctly recall it as a memory of my boyhood—Judge Field possessed the expressed confidence of not only his own party, but of the opposition. His reputation as an enlightened leader of his profession had spread to all parts of the State, and the general hope and conviction were that he would be, not a partisan, but a thoroughly upright and honest judge. He went upon the bench with the "All Hail!" of the bar, and was greeted as a veritable "Daniel come to judgment."

A few months after he went upon the bench of the State Supreme Court the legislature passed a Sunday law, or an act for the better observance of the Sabbath. The question of the policy of such a law had not figured in the preceding political campaign. The same canvass which resulted in the choice of the members of the legislature for that session also placed Judge Field on the Supreme bench. That legislature (1858) was Democratic in both branches. There was little excitement over the efforts to enforce the first Sunday law, compared with that which a much later and similar enactment provoked. One Neuman, an Israelite, a clothing dealer, being arrested and imprisoned for violating the new law, was brought before the Supreme Court on habeas corpus. That tribunal was then composed of Judges David S. Terry, Peter H. Burnett and Stephen J. Field. The law was declared unconstitutional, Judge Field dissenting. The latter discussed the law as a moral, sanitary and business measure. He declared that in its enactment the legislature gave the sanction of law to a rule of conduct which the entire civilized world recognized as essential to the physical and moral well-being of society. He should be quoted on this important question:

Upon no subject is there such a concurrence of opinion among philosophers, moralists and statesmen of all nations, as on the necessity of periodical cessations from labor

One day in seven is the rule, founded in experience and sustained by science. There is no nation, possessing any degree of civilization, where the rule is not observed, either from the sanctions of the law or the sanctions of religion. This fact has not escaped the observation of men of science, and distinguished philosophers have not hesitated to pronounce the rule *founded upon a law of our race*.

The legislature possesses the undoubted right to pass laws for the preservation of health and the promotion of good morals, and if it is of the opinion that periodical cessation from labor will tend to both, and thinks proper to carry its opinion into a statutory enactment on the subject, there is no power, outside of its constituents, which can sit in judgment upon its action. It is not for the judiciary to assume a wisdom which it denies to the legislature, and exercise a supervision over the discretion of the latter. It is not the province of the judiciary to pass upon the wisdom and policy of legislation; and when it does so, it usurps a power never conferred by the constitution.

In this dissenting opinion, Judge Field then proceeds to argue that the law was in the interest of labor; that its aim was to prevent physical and moral debility; that in this aspect it was beneficent and merciful. (See *ex parte Neuman*, 9 Cal. 502.) Three years later the legislature passed a Sunday law substantially the same as that of 1858. That body was Republican in both branches. The first Sunday law was approved April 10, 1858; the second, May 20, 1861. This second act, which was, as stated, substantially the same as the act of 1858, was declared constitutional by the Supreme Court. Judge Field was still on the bench, and had been reinforced by Judges Joseph G. Baldwin and W. W. Cope, who succeeded Judges Terry and Burnett. Judges Field, Baldwin and Cope were of one mind—that the law was constitutional (see *ex parte Andrews*, 18 Cal., 680); and they emphasized and reaffirmed this judgment in *ex parte Bird* (19 Cal., 130). These two decisions of Judges Field, Baldwin and Cope have been repeatedly commented on and approved by their successors on the Supreme bench. (See *Cohen vs. Wright*, 22 Cal., 321; *Jackson vs. Shawl*, 29 Cal., 271; *ex parte Shrader*, 33 Cal., 282.) It is to be recorded here that this Sunday law, which became a part of our Penal Code, was repealed by act of February 8, 1883.

The opinions of this jurist, delivered while on our State Supreme bench, are comprehended in fifteen volumes of the California Reports—numbers seven to twenty-one inclusive. They have been commented on and approved by Mr. Emory Washburn, Professor of Law in Harvard University, (see *American Law Register* for June, 1862), by Judge Dillon, a leading and universally approved American law writer, by Professor John Norton Pomeroy, who has ably sketched Judge Field's career as legislator and jurist, by the late Judge Joseph G. Baldwin, one of the most fertile legal minds, who said that "Judges reposed confidence in his opinions, and he always gave them the strongest proofs of the weight justly due to his conclusions," and by many other authorities on legal science. Says Professor Pomeroy: "I was told by a gentleman who has for many years been employed by a leading law

publishing house of Boston as its traveling agent through all the States of the Mississippi and Ohio valleys, that, when he first began his work, the New York Reports were universally sought for in every State; but that of late years the demand had changed from the New York to the California Reports. Everywhere through the Western and the Northwestern States the profession generally wished to obtain the California Reports as next in authority to those of their own State."

This gratifies our State pride; and to whom do we owe it more than to Judge Field? He had been longer on our Supreme bench than any other man; his decisions had been less disturbed and more respected by his successors than those of any other judge, and, being grounded in immutable principle, they have all the strength and majesty of authority.

Judge Field was commissioned by President Lincoln a Justice of the Supreme Court of the United States, on March 16, 1863. He took the oath of office, May 20th, following. He was assigned to the Tenth Circuit, then comprising California and Oregon, Nevada being afterwards included. He is therefore from necessity, what in earlier days he was from inclination, a great traveler. Before the overland railroad was completed he traveled over 12,000 miles a year; since that event, over 8,000 miles a year. Formerly he was required to hold court in San Francisco one term, annually, and also sit with the United States Supreme Court at Washington, each winter. Since 1869, under a law creating the office of Circuit Judge, he has held court in San Francisco every other year. All of his original associates on the United States Supreme bench have passed away, except Judge Miller. Ever since he entered upon his high office he has regularly attended the terms of court, and done his full share of the work.

In the Milligan case, which went up from the Circuit Court in Indiana, on habeas corpus, it was held (Justice Davis writing the opinion) that military commissions organized during the war, in a State not invaded nor engaged in rebellion, in which the Federal Courts were open and in the undisturbed exercise of their judicial functions, had no jurisdiction to try a citizen who was not a resident of a State in rebellion, nor a prisoner of war, nor a person in the military or naval service. This was a five-to-four decision, Judge Field turning the scale. He was also one of five against four in the Cummings case, in which it was held that a State could not exact an oath for *past* conduct. Judge Field wrote the opinion in this case. He said therein that "Test oaths in England and on the continent of Europe have always been limited to an affirmation on matters of present belief, or as to present disposition towards those in power. It was reserved for the ingenuity of legislators in our country, during the civil war, to make test oaths reach to past conduct."

He also wrote the opinion in the Garland case. Here, again, were five judges against four. Mr. Garland is now Attorney General of the United States. He represented Arkansas in the Confederate Congress. In July, 1865, he received from the President of the United States a full pardon. He could not take the oath of office prescribed for attorneys of the United States Supreme Court. He asked to be permitted to practice without taking the oath. The court held that he could freely do so, his pardon having released him from all penalties and disabilities.

On the Chinese question Judge Field's views are on record. They are identical with those of Judges Sawyer and Hoffman—namely, that the whole power over the subject lies in the federal government. (See the chapter on Judge Sawyer.)

On January 13, 1866, at Washington, while opening his mail, which lay on a center table, Judge Field noticed among the papers a small package about an inch and a half thick, three inches wide, and three and a half inches long. It was stamped, addressed "Hon. Stephen J. Field, Washington, D. C.," and was marked "Per Steamer." It bore no trace of hand writing. The Judge's name had been cut from a volume of the California Reports, and pasted on. The words "Washington D. C.," and "Per Steamer," had been cut from a newspaper. On the other side were the words in print: "From Geo. H. Johnston's Pioneer Gallery, 645 and 649 Clay Street, San Francisco." Thinking it was a present for his wife, who was then in New York, he concluded to partially open it to satisfy himself on that point. Tearing off the paper and raising the lid of what appeared to be some sort of a little box, he was struck with its black appearance inside. "What is this?" he said to Judge Delos Lake, of San Francisco, who was making him a call. Judge Lake also suspected something wrong, and quickly said, looking over his friend's shoulder: "Don't open it—it means mischief." Judge Lake took it in his hands, and, treating it with the utmost tenderness, carried it over to the capitol and showed it to Mr. Broom, one of the clerks of the Supreme Court. They concluded to try to explode it. They dipped it in water, let it soak for some minutes, then took it into the carriageway, under the steps leading to the Senate chamber, and threw it against the wall, shielding themselves behind one of the columns. The blow exposed the contents. Twelve pistol cartridges lay imbedded in glue; a bundle of sensitive friction matches, a strip of sandpaper, and some fulminating powder were ingeniously placed—the whole contrivance being so arranged that opening the lid would ignite the matches, which, in turn would explode the cartridges. It was sent to the War Department, and General Dyer, Chief of Ordnance, had it examined. A detailed description of it was returned to General Dyer by Major Benton.

This murderous instrument was evidently sent to the Judge by some man

in San Francisco, who had been disappointed by some decision. On the inside of the lid was pasted a slip cut from a San Francisco paper, of October 31, 1864, stating that Judge Field had on the day previous decided a certain case, but this availed nothing so far as the discovery of the bloody-minded inventor was concerned. He was never found out. Not even an arrest was made in connection with the affair, although the San Francisco police and many detectives spent months in trying to find a clue.

Judge Field was married in San Francisco, in 1859, and his wife, who was Miss Sue V. Swearingen, is still living. There has been no issue of the marriage.

About the year 1880 Judge Field had printed, in a neat little volume of 250 pages, his autobiography. This was to preserve the record of his eventful life, and was distributed to his intimate friends, only thirty copies having been printed. A year later an octavo volume of 464 pages was given to the profession by Chauncey F. Black and Samuel B. Smith, of New York City. It is a compilation made by political and personal friends of judge Field, is an account of his work as a legislator and judge, and gives copious extracts from his many opinions. It is preceded by an introductory sketch by John Norton Pomeroy, and contains also an elaborate article by John T. Doyle, of the San Francisco bar, on the Electoral Commission of 1877, and Judge Field's connection therewith.

Here is a pleasant extract from the autobiography, and it may be well to rest at this amusing point in a life that has been so attended with personal peril, or as Judge Field would term it, the fascination of peril. The Judge was at a dinner at Welcker's, in Washington, given by Ward, the celebrity who cuts some figure in the chapter on John T. Doyle:

On the occasion mentioned some of the brightest spirits of Congress were present. As we took our seats at the table I noticed on the menu a choice collection of wines—Johannisberg among others. The dinner was sumptuous and admirably served. Our host saw that the appropriate wine accompanied the successive courses. As the dinner progressed, and the wine circulated, the wit of the guests sparkled. Story and anecdote, laughter and mirth abounded, and each guest seemed joyous and happy. At about eight, song had been added to other manifestations of pleasure. I then concluded that I had better retire. So I said to my host that if he would excuse me I would seek the open air, and I left. Just at this moment Mr. Rodman M. Price, who had been Governor of New Jersey, made his appearance, and exclaimed, "How is this? I was invited to dinner at eight, producing his card of invitation. "Look again," said Ward, "and you will see that your eight is a five." And so it was. "But never mind," said Ward; "the dinner is not over. Judge Field has just left; take his seat." And so Price took my place. He had been traveling in the Southern States, and had been an observer of the proceedings of various State Conventions then in session to frame constitutions under the Reconstruction acts, which bodies he termed "Congo Conventions." To the amusement of the party he gave an account of some curious scenes he had witnessed in these conventions, and wound up his stories by expressing his opinion that the whole reconstruction measures would soon be "smashed up" and sent to "kingdom come" by the

Supreme Court. The loud mirth and singing attracted the attention of news hunters for the press—item gatherers—in the rooms below. Unfortunately one of these gentlemen looked into the banquet room just as Price predicted the fate of the reconstruction measures at the hands of the Supreme Court. He instantly smelt news, and inquired of one of the waiters the name of the gentleman who had thus proclaimed the action of the court. The waiter quietly approached the seat of the Governor, and whilst he was looking in another direction, abstracted the card near his seat, which bore my name. Here was, indeed, a grand item for a sensational paragraph. Straightway the news gatherer communicated it to a newspaper in Washington, and it appeared under an editorial notice. It was also telegraphed to a paper in Baltimore. But it was too good to be lost in the columns of a newspaper.

The account then shows that Mr. Schofield, member of Congress from Pennsylvania, introduced into the House a resolution directing the Judiciary Committee to inquire into this matter, and report whether the alleged offender ought to be impeached. An exciting debate followed, and the resolution was adopted by a vote of 97 to 57. Some members stated that they voted for it because it was due to the Judge that he should be vindicated. Judge Field says that he has never been able to appreciate the force of this reason. The committee, before reporting, was discharged from further consideration of the matter.

CHAPTER XV.

Henry E. Highton—A Strong Original Character—Scion of a Line Distinguished for Mental Activity—Pluck and Patience in Early Years—A Life full of Achievement—Some of his Great Causes Stated—The Denis Kearney Agitation—A Defence Turned into a Prosecution—The Impeachment of Mayor Killoch—The Dawson Injunction Case of "Church and State"—Public Service on the Bulkhead Question—Commanding Views on Social and Political Problems—A Chapter of Many Useful Lessons.

In the Supreme Court at Sacramento, on a day of the June Term, 1866, immediately after the adjournment, one of the judges, passing from the bench into the midst of the crowded bar, took the hand of a young man who had occupied the session with an argument characterized by great force and ingenuity. "Henry, I'm paid now," he said, and his gratification was manifest in his voice and countenance.

The general eye was on them and it seemed as if the Bench and Bar were then shaking hands. They were representative men, thus face to face in that distinguished place and presence. The judge was Oscar L. Shafter, the lawyer was Henry E. Highton. One is now no more; the other is still in the long prime of service.

It had been under the eye of Shafter, not yet a judge, that Highton pursued his studies in law. And in the man of counsel the student had found, too, a personal friend of rare constancy, "the best friend that man ever had," as he sadly testified some years later, when his friend died. The veteran had watched the tyro's indefatigable quest of knowledge, and it had been his pleasure to open to him the riches of his own store. And now on the occasion alluded to, it did him good to acknowledge the satisfaction of an ample reward.

Mr. Highton's career furnishes a fine illustration of the power of labor, when intelligently directed. He came to this country, a boy pioneer, without a friend or a dollar, resolved, even then, to make his mark at the bar, and for six years followed a laborious life in the mining regions. Slowly and carefully, under adverse conditions, he prepared himself for the legal profession, and at the first favorable opportunity entered upon the practice. By the most patient and unremitting effort, he gradually acquired business and reputation, pressed steadily towards the front, and finally took his place beside the first men at this bar. He was no child of chance or pet of fortune—he worked his way. In his brave struggles, so signally crowned with triumph, he is to be likened not to one who climbs a ladder but to one who ascends to

the summit of an Egyptian pyramid, and finds beneath him a foundation which trembles only with the quaking of the earth.

Henry Edward Highton was born in Liverpool, England, July 31, 1836. On his father's side he came from old Leicestershire lineage, while his mother's family have been settled in Yorkshire for many generations. His father Edward Rayner Highton, was born in Leicester, September 11, 1811—a fellow countryman of our Baker, and born in the same year with that great lawyer, orator and soldier. In his native country the elder Highton held many military and civic positions, and there, as well as in this, his adopted land, his name and fame are inseparably blent with movements for municipal betterment and for the reformation of criminals, especially juvenile delinquents.

In 1866, this gentleman, at the request of friends, gave to the public in pamphlet form, "Some General Observations on Matters of Public Interest, with special reference to the Municipal Government of San Francisco." Therein he urged the adoption of the "Family System" in our Institutions for the reform of juvenile delinquents. He declared that whenever brute force was employed to maintain discipline in a reformatory, it indicated a failure in the system pursued. He took occasion to condemn the now venerable "Consolidation Act" of San Francisco, as opposed to the Anglo-Saxon spirit, so practical and jealous of governmental interference; the limitations of that act having referred the minute details of municipal government to the State legislature. The effect, he said was not to check fraud; it enlarged the lobby of the legislature, and there was a great deal of legislation hostile to the city. A detective police force, if necessary, he pronounced to be a necessary evil, a most efficient instrument of tyranny, the means it uses to discover crime being too apt to encourage the lowest forms of vice. To quote: "Its operations have, therefore, under popular forms of government, been generally limited to tracing out political offenders and the perpetrators of those exceptional crimes which had been planned with unusual sagacity and executed with uncommon dexterity. The pompous mystery which artfully shrouded its operations in former days, to the terror of the simple and the exaggeration of its own importance, has long since been dissipated with many other professional mysteries which are now but subjects for ridicule along with the parochial Dogberrys and Bumbles of a past age."

The Highton family name is interwoven with modern English history and English classics. The Rev. Henry Highton, fellow of Queen's College, Oxford, was long a master of Rugby School, where he was educated, and where his brilliant parts attracted the attention and won the especial favor of the accomplished scholar, Dr. Arnold. He translated the Greek Testament, contributed largely to *Nature*, a leading scientific journal, became Head Master of the Cheltenham School or college and won the friendship of Dean

Stanley, of Matthew Arnold, of the recent Archbishop of Canterbury and of other distinguished men. Another Edward Highton was a celebrated engineer, associated with the younger Brunel in the construction of docks in Cardiff, Wales. He distinguished himself in railroad construction in Austria being one of the framers of the Austrian railway system. For some years before his death, he was the telegraphic engineer to the London and North-western Railway. He was author of a work on the telegraph, and many improvements in the electric telegraph are encomiastically credited to him and his brother Henry (above mentioned) in the *Encyclopedia Britannica*.

John Highton, the paternal uncle of our friend under review, was a famous classical scholar, rector of a church in Leicester, a grand, good man, whose death evoked popular lament and whose life is commemorated by a shaft of marble, typical of the durability of his influence upon his age. A second Edward Highton is now vicar of Bude, Cornwall. Another relative, Edward Gilbert Highton, M. A., was long a Queen's Counsel in London. He was a contributor to the *London Times*, and connected with various literary societies. I could recall and record much more under this head, taking my readers through the Peninsular war, opening before them "Stanley's Life of Arnold," handing them volumes of sermons, etc., all in proof and illustration of the intellectual activity of the Highton stem.

Henry E. Highton's education was commenced at the school of Rev. J. C. Prince, in St. Anne street, Liverpool. During his stay at that institution he took every prize for classics offered to his class. The intention was to complete his education at Rugby, where the Rev. Henry Highton was one of the masters, but this was intercluded by his father's emigration to the United States. It was in 1848 when the elder Highton came to America with his son, the latter then aged twelve years.

It was the parental wish to consecrate young Henry to the pursuit of law, and nature herself acquiesced in the design. A brilliant career at the bar was to be his destiny, which he seems to have early foreseen, and the youth evinced his aptitude for the science—just as Pope "lisp'd in numbers, for the numbers came." Said the poet Bryant, alluding to his father: "He taught my youth the art of verse, and in the bud of life offered me to the Muses." Mr. Highton may refer to his father with a kindred feeling. By the light of sun, or lamp, or candle, behind the white cliffs of Albion, on the deep, and in the bosom of the broad continent which is the land he loves best, his legal studies, under intelligent parental direction, were never intermitted. His father was never a lawyer, but by his broad reading and grasp of mind was well qualified to teach the young legal idea "how to shoot." I have heard the old gentleman speak, with paternal pride, of his son's early promise, and of the faith in his future which the boy kindled in the breasts of some of England's learned men. Said the Rev. Mr. Prince to the father, when the latter

was about to start with his son for the New World: "Your boy is especially adapted for the legal profession; why not leave him in England? I will take charge of him. I feel he will become Lord Chancellor."

It was at Milwaukee, Wisconsin, that the father and son first settled on this side the water. There the young man was placed in the office of a leading lawyer. After a few months the gold fever began to rage throughout the country, and the ambitious and adventurous youth, not thirteen years of age, started across the plains for California. Not to touch the incidents of his toilsome and eventful trip, he rested, on September 3, 1849, at Weavertown, three miles from Placerville, then called "Hangtown." From that date until the spring of 1856, with the exception of a few months passed at Sacramento, he lived in "the mines," engaged in various occupations, working a great part of the time at actual mining in the placers, like many others who afterwards attained distinction at the bar. During this period while his character was forming amid shifting scenes, mushroom settlements and anomalous communities, he kept his mind and heart on the law, studying it in a desultory way, but not altogether without system.

Mr. Highton came to San Francisco in 1856, being then twenty-one years old. He came without means, and knew no one here except Dr. C. C. Knowles, the dentist, who took great interest in him and showed him much kindness. Shortly after the organization of the Vigilance Committee of that year, he became a friend and associate of the late Frank Soule, who, with William Newell, owned the then San Francisco *Chronicle*, which died a few years later. He was made first reporter on that paper, after the fashion of those days, his duties being afterward enlarged. He gathered local items, reported law proceedings and public meetings, and condensed news from interior journals and from Eastern, Australian, and Chinese newspapers, which arrived in large batches. After two or three months of this service, he wrote leading articles for the old *Chronicle*, contributing also to the *Golden Era* and the *Spirit of the Times*. During the legislative session of 1859, he was the Sacramento and legislative correspondent of the San Francisco *Herald*, and after the close of the session wrote for that paper a series of articles on the manufacturing interests of San Francisco and upon other topics. Meanwhile he pursued his law reading at night.

Then he devoted himself entirely to his legal studies for one year, and, on, July 3, 1860, he passed his examination and was admitted to practice by the Supreme Court, on the report of a committee composed of General Thomas H. Williams and John B. Felton. He answered correctly every question, including the catch query or *pons asinorum*: "What is the difference between the undivided moiety of the whole and the whole of an undivided moiety?"

By the advice of Oscar L. Shafter he commenced the practice of law at Sonoma, then just incorporated. In the fall of 1860 he returned to San

Francisco and began law practice there. In 1861 Mr. Shafter (who had not then been on the bench) visited the East, leaving to Mr. Highton several important causes to try in the District Courts, under the supervision of James McM. Shafter and Judge Heydenfeldt. In 1862 Mr. Highton was, for a few months, in partnership with Judge O. C. Pratt and the late H. K. W. Clarke. To the latter's widow, a lady of remarkable intellect and attainments, whose latter years were attended by great physical and mental suffering, he subsequently rendered important services. For a few months, also, in 1864-5 he was in partnership with William P. Daingerfield and J. Douglas Hambleton. These were his only partnerships. Afterwards, for a year or more, he was employed specially in certain matters by Hall McAllister, who became his warm and constant friend. He is much indebted to Mr. McAllister for his introduction to general practice.

At times, his successful conduct of great criminal cases has left an impression on many that his specialty is that branch of the law. But he, like McAllister, has *no* specialty. Indeed, he has no fondness, although great fitness, for criminal business. He has repeatedly refused to take part in the *prosecution* of a capital case, and has made this a rule of his professional life.

Mr. Highton has never held, or aspired, to a public office, or been a member of a political convention; yet he has great public spirit, which has been often signally displayed, as will be seen.

In 1860, the late John B. Felton, and Levi Parsons (the latter had been a District Judge in San Francisco), attempted to secure the passage by the Legislature of what was known as the "Bulkhead Bill." The proposed measure would have given the whole water front of San Francisco to a corporation of French capitalists, represented by the then powerful firm of Pioche, Bayerque & Co. (See the chapter on John B. Felton.) The boldness and magnitude of the scheme alarmed the metropolis. A "Citizens' Anti-Bulkhead Committee" was formed, with Lafayette Maynard as chairman. Mr. Highton joined this body, and was forced by circumstances and the partiality of friends into a prominent position. He wrote the memorial to the Legislature, the address to the senate, and various other documents against the measure, contributing to the local press many articles on the subject, which were published as "leaders." After the mission of the committee was accomplished by the defeat of the bill, he prepared the congratulatory address to the people of the State, of which many thousands of copies were distributed. The committee, through Mr. Maynard, presented to him a fine gold watch, "as a mark of appreciation of his services against corrupt legislation." At the next session of the legislature the bill passed both houses, but was killed by the vote of Governor Downey. Shortly afterwards the Governor visited San Francisco, and the people turned out en

masse to receive him. A torchlight procession escorted him to the old American Theatre (where the Halleck block now stands), and there Mr. Highton presented and read the resolutions drawn by Hon. W. J. Shaw and accompanied them with a vigorous speech.

He was the author of the resolutions read and adopted at the great Union mass meeting at the corner of Montgomery and Market streets in San Francisco, in April, 1861. Several other prominent men had submitted resolutions to the committee having the meeting in charge, and some of them were very lengthy. Mr. Highton's draft was preferred, and I give it here as a happy example of condensation and exact expression :

Resolved, That the full and fair development of American civilization, and the extension of civil and religious liberty throughout the world, require the perpetuity of the American Union and the protection of the American government against any and all assaults, whether of foreign or domestic foes.

Resolved, That the allegiance of an American citizen to the federal government is superior to all other obligations, and binds him in law and in honor to aid in the suppression of rebellion and in the enforcement of the laws.

Resolved, That in the present crisis in the history of our country, our reason, our hearts and our arms are with the constitutional authorities of the land, and that we pledge ourselves now and in every emergency to stand by the Union of these States and the government which has been instituted for the perpetual preservation of that Union in peace and in war, without reservation, qualification or condition, and at any sacrifice of life or property.

After the anti-bulkhead victory, Mr. Highton was urged by Lafayette Maynard and others to run for the State senate, but he told them he wanted no office, and the best service his friends could render him was to send him law business.

In 1862 he delivered the annual address before the State Agricultural Society. In 1864 he made several elaborate public speeches in support of General McClellan for the presidency, which were published substantially as delivered, and which dealt mainly with financial and constitutional questions. In 1865-6 he wrote various articles and documents against the reconstruction policy of the Republican party, holding that the war had been conducted on the theory, to which he assented, that the federal Union and the States were legally indestructible, and that when the war ended, the legal status of the Southern States remained unchanged. The first use of the term "rehabilitation" in this connection is attributed to him. He declared that rehabilitation, and not reconstruction, was the proper policy. In 1869 he delivered the Fourth of July oration at the California Theater, San Francisco, when Governor Seward was present, and a happy allusion of his to the distinguished guest caused the whole audience to spring to their feet and break into cheers. In 1870 he delivered the Fourth of July oration at Stockton. Both of these last mentioned addresses were strictly non-partisan, and were well received by the entire press.

In 1874 Hon. John A. Stanly, then County Judge of San Francisco, charged the grand jury to investigate the matter of the failure of Mayor James Otis and Treasurer Charles Hubert, to count the money in the county treasury, as required by law. This was regarded by many as an attack upon the Mayor, and a public indignation meeting was held, at which strong resolutions were passed supporting the Mayor and condemning Judge Stanly. A noteworthy incident of the occasion was the appearance of honest old Monroe Ashbury, who had been invited to speak, but who surprised the assemblage by openly indorsing the County Judge. A few days later an immense public meeting was held to express approval of Judge Stanly's course. Two-thirds of the taxable property of the city was represented, and a majority of the leading lawyers and of the judges on the bench were present. Mr. Highton was the speaker of the evening, and his address was enthusiastically received. Resolutions were passed sustaining Judge Stanly, and demanding the return to the treasury of about a million and a half dollars which had been deposited in a private bank by the Tax Collector. Within a day or two thereafter, the money was returned, with the exception of between two and three hundred thousand dollars, which was subsequently lost.

Mr. Highton was an early opponent of Chinese immigration. He took a firm stand on this question in 1857, and at various times since has given public expression to his views. After President Arthur's veto of the Chinese bill Senator Ingalls, of Kansas, who had voted against the bill, addressed a letter to a gentleman of this city, in which he expressed his sentiments on the Chinese question, and declared that the vetoed bill was a deliberate affront to a great nation. The letter was handed to Mr. Highton, who wrote a lengthy reply to the Senator, which was published and widely read. While holding tenaciously to the policy of Chinese exclusion, he is yet uncompromisingly opposed to all violence to Chinese residents. He has said strong things against the Chinese, but has also declared that the whole power of the government should be employed, if necessary, to prevent the slightest personal harm to the Chinese among us, or the invasion of a single one of their legal rights. While acknowledging that the working classes have long had good cause for complaint against corporations and capitalists, he yet firmly opposed the movement under Denis Kearney. He successfully defended John Hayes for throwing Kearney from the platform at Platt's Hall, at a meeting called to consider the relations between the city and the Spring Valley Water Works. This was a long and exciting trial. It was admitted that Hayes did assault Kearney as a matter of fact, but Mr. Highton maintained that the act was committed in defense of the rights of popular assemblage and free speech, and supported his position by many historical and judicial precedents.

He has always regarded his six years' labor in the mines as of incalculable benefit to him, and credits it with his physical development. It embraced

the plastic period of youth, made him an American at heart and imbued him with a vital sympathy for the working classes. He believes that men's lives are valuable in proportion to the amount of useful work which they do. He thinks that American civilization is the highest, and that the American system of government is the most potent to produce the best results. His faith in the people is thorough and profound. He and the late Judge Lake, both Democrats, opposed the action of the San Francisco League of Freedom in its aim to obstruct the old Sunday law; they held such action to be anti-American and illegal, because the law whether right or wrong as a political measure, had been declared constitutional by the Supreme Court. Mr. Highton spoke on the subject at Platt's Hall. He has been a member of the Democratic State Club since its organization, but has little to do with party management, except in his own way, which is particularly independent. He is Jeffersonian, strongly sympathizing with that class of Democrats not numerous in large cities, but to be found in force in agricultural communities. He is an open enemy to the machine politicians.

He is thoroughly identified with the anti-monopoly principle *within* the Democratic party, and effectually contributed in the year 1882 to the introduction of that principle into the platform of his party and the political canvass. He made no speeches, but wrote a "Declaration of principles," and a letter to the delegates to the State convention, of which many thousand copies were circulated. He wrote the platform adopted by his party club and approved by other clubs, and which was a vigorous and manly protest against monopoly and bossism. To the same end he has steadily and consistently used his influence personally with his large acquaintance throughout the State. He is recognized as distinctively Californian, with the Western habit of thought, and a strong love for his State and country. He is a life member of the California Pioneers.

In August, 1874, Mr. Highton married the second daughter of the late P. M. Scoffy, long a merchant in New Orleans and San Francisco, who died highly respected and much beloved, in 1875. His wife is an amateur artist of decided merit. She has painted a number of fine pictures, one of which, a large painting of Mount Shasta, was exhibited at the the rooms of the Art Association. He has no children. He is a member of the Episcopal Church, and a constant attendant at Trinity. He has no patience with infidelity, or atheism, and has frequently spoken in favor of religious organizations, outside of his own church.

Mr. Highton has tried, either alone or as leading counsel, many important cases in every branch of his profession, especially jury cases, but he prefers controversies involving intricate commercial questions. He once kept a set of books for three years in order to know how to comprehend accounts. There are leading cases of his in the Supreme Court Reports, in which his name

does not appear, because he was employed as counsel and was careless about getting his name into the published volumes. In his early practice he wrote many briefs for other able lawyers. No less a man than Delos Lake said on one occasion : "A legal opinion from Mr. Highton has as much weight with me as a decision of the Supreme Court."

Here are some observations upon Mr. Highton's intellectual qualities—an interesting compendium, kindly furnished me by his father :

"From earliest days he was remarkable for his persevering avidity to *know*, and for his logical deductions. The first intimation I had of his being able to read was when he was about five years old, when he read to me with ease and perfect, intelligent intonation, an article in *Chambers' Journal*. I was in favor of retarding his precocious intellectual development, but with some 'letter blocks' which were in the nursery, and some miscellaneous scraps and simple books, he had acquired the art of reading, with no other aid than the occasional attention of a relative, who assisted him to get rid of his importunities.

"He was an inchoate lawyer from his infancy. Tenacious, argumentative, quick in appreciation of points, and detection of fallacious sophisms ; clear in conception and rapid in generalization ; impatient of injustice, but cautious and wary to correct. His desultory education was rather an advantage. The trammels of a system would probably have repressed some of his best qualifications as a forensic lawyer, and the danger which might have been apprehended was averted by his acute and minute observation of details, which is remarkable. He has one of the most retentive and capacious memories, which, with his quickness of application, supplies him with an unusual fund of resource in difficulties. A 'legal' client, for he had been constantly 'at law' with somebody, and who was also a very successful speculator and financier, once told me, that, in all his experience, he had never found a lawyer with so many legal resources. His forte, if he can be said to have one, where the aptitude is so general, is in simplifying complicated details, whether in mercantile transactions, or in analyzing circumstantial evidence. His greatest fault is in a sometimes almost wearisome exhaustion of legal points, but he is never garrulous. He is chivalrously faithful to his clients, and, in fact, fidelity is a prominent characteristic in all his relations with others.

He has an unusually well balanced mind. Mr. Fowler, an eminent phrenologist, who came to examine heads in an institution under my charge, told me, after examining him, that he had the best balanced head, according to the principles of phrenology, that he had ever examined. The only dominating indication being 'love and approbation' and 'self-esteem,' which he said might be a useful lever in the direction of his mind.

Let me preserve here a condensed history of the celebrated impeachment case of Mayor Kallloch, in connection with some others of the many remarkable cases Mr. Highton has tried in our courts.

In the fall of the year 1879, Rev. Isaac S. Kallloch, pastor of the Metropolitan Baptist Church, was elected Mayor of San Francisco under very extraordinary circumstances. Local politics were then strangely complicated. Three party organizations contended for municipal control—Republican, Democratic, and Workingmen, the last named having, for a brief spell, absorbed the bulk of the Democracy. The Republicans elected their candidates with the exception of their nominee for Mayor. The Board of Supervisors

was unanimously Republican, but Kalloch was chosen to preside over them as Mayor by the Workingmen, with the help of independent voters who sympathized with him in his sufferings, he having, a few weeks before, been shot and seriously wounded by Charles DeYoung, senior proprietor of the *San Francisco Chronicle*. The minister Mayor, at the time of his election, was lying prostrate from the effect of his wound. After his recovery and induction into office he continued to be, as he had been for a year previously, a bold and eloquent, if not a reckless and defiant, advocate of the Workingmen's cause. Throughout his official term there was unrelenting hostility between him and the Board over which he presided. The city was agitated over the long and violent controversy, the poorer classes—the army of the discontented, not to say lawless—rallying around and applauding the Mayor, who, like his coadjutor, Dennis Kearney, constantly fulminated against wealth and aristocracy. That was a critical time in the city's history. Kalloch from his pulpit, Kearney from his sand-lot platform, and the press from its broad vantage ground of view, long kept the public heart in ferment. Turbulent meetings were frequent, bodies of idle men paraded the streets by day, a large element of the population was on the eve of open revolt against social order, threatening alike with mob violence the palaces of the rich and the dens of the Chinese. Trade was in great measure paralyzed, property values depreciated, and capital became thoroughly alarmed.

For this state of affairs the Board of Supervisors, and behind them, perhaps, one-half the population and the bulk of the mercantile community, held Mayor Kalloch largely responsible, by reason of his frequent and violent public utterances. It was determined by the Board to take official notice of his course. At its meeting, April 28, 1880, the judiciary committee presented a lengthy paper recommending that judicial proceedings be instituted to have the Mayor removed from his office. To condense this document, it set forth that the Mayor had exhorted and advised the lawless and discontented elements to form processions and parade the streets; that he had threatened mob violence to individuals and insurrection against the laws; that under the pretence of counseling the vicious and turbulent against mob violence, he had insidiously advised them to be in readiness for bloodshed and the overthrow of lawful authority. "To report the language used by Isaac S. Kalloch, Mayor, would render it necessary to embody the whole of all his public addresses, for after a very careful and critical reading and analysis of the language used, both in public speeches and official communications, we find," said the committee, "abundant reason to express our regret and the public indignation at his conduct while filling the position to which we believe an unfortunate occurrence elevated him, and in which position his example and influence have been and are more heinous, prejudicial and injurious to this community than those of the brutal and degraded persons who have been

arrested and convicted for the unlawful acts which he aided and abetted." The paper was throughout dressed in words of most scathing denunciation. The resolution calling for the Mayor's impeachment was put by him from the chair without remark and without any manifestation of feeling, and was adopted by a unanimous vote.

There were two methods of removing public officers—one by summary process, the second by indictment. Under the latter no officer had ever been pursued in San Francisco, while under the first mode, a City and County Assessor and a Coroner had been removed from office. This method, adopted by legislative act in March, 1874, and afterward expressed in a section of the Penal Code, provided that when a complaint in writing, and verified by oath, is presented to a District Court against an official for violation of law, the Court shall cite the accused to appear in not less than five nor more than ten days and at some time not more than twenty days from the date of filing the complaint, the Court shall proceed to hear the evidence upon the accusation. If the complaint is sustained by the testimony, a decree shall be entered removing the accused from office and giving judgment for the complainant for \$100 and costs. This was the mode of procedure adopted in the case of Mayor Kallach. One week after the Board of Supervisors had resolved to take action against the Mayor, as stated, a mass meeting of sympathizers with the latter was held, which was largely attended and illuminated by bonfires. At this meeting a score of prominent citizens figured as officers and speakers and a vigorous letter from Henry George was read, but perhaps four-fifths of the large audience belonged to the "sand-lot" element. Resolutions extravagant in expression, were adopted with one voice, wherein the Board of Supervisors was denounced as "partisan and corrupt," while the party chiefly concerned was styled "our worthy and honored Mayor, the most upright, honorable and just official that has ever presided over the municipality of San Francisco."

The character and temper of this meeting, were reflected best, perhaps in certain resolutions (not the regular series just referred to) offered by one O'Leary which were adopted amid lusty yells. To make them intelligent it must be stated that Dennis Kearney, the "Sand-lot" apostle, and founder of the Workingmen's Party of California, had recently been imprisoned for the use of incendiary language, his sentence by the Police Court having been affirmed by a judge of the Superior Court. The Supreme Court afterwards discharged Kearney. O'Leary's resolutions will be found diverting, if not coherent :

" *Whereas*, When the bloated and sensual lecherer becomes gorged by his debaucheries, his foul imagination still remains as an appetizer to desire, and in order to appease his sensual cravings, he turns his foul, soul-destroying gaze on the holiest and purest objects ; and

Whereas, We recognize the incarceration of Dennis Kearney as an outrage on truth and Justice and on everything that is made holy and sacred by Constitutional rights and privileges, and tradition springing from the genius of our institutions; therefore be it

Resolved, That we, the citizens of San Francisco in mass meeting assembled, look upon the blind goddess of this city as nothing more than a vile strumpet, who has yielded to the sensual embrace of political thieves and panderers to the unholy ambition of corporation nobs.

Resolved, That we solemnly protest against the longer retention of Dennis Kearny behind prison bars, for we look upon his imprisonment as unconstitutional and unwarranted and we pray that the Supreme Court will loosen his bonds and let him walk forth a free citizen."

Three days later the complaint to remove the Mayor from office was filed in the Superior Court. It was signed and verified by citizen J. A. Coolidge; the special counsel engaged by the Board of Supervisors to prosecute the case being Darwin & Murphy, and W. H. L. Barnes. The document was lengthy, and its specific charges were that the Mayor in his inaugural address, did wantonly, maliciously, and without cause or reason, impeach the honesty and integrity of the people of the city, by the use of the following language: "The people expect their officials to steal. * * * They are disappointed if they do not. If a man passes through the fire of official temptation unscathed, and comes out poor, he will get his reward from men from whom better things might be expected, in the sarcastic reflection, 'You were a fool not to make better use of your opportunities.' There must go with this another reflection equally mortifying to our pride, and equally unpleasant for me to make, that we are, perhaps, the only civilized community on earth where it is absolutely no bar to a man's social recognition or respectability for it to be known that he has stolen himself rich;" that, thereafter in a public speech while Mayor he said: "The people of this city have become so utterly demoralized that they attribute a mercenary motive to every man's action when it does not suit them;" that he had advised the forming of processions and parading the streets by a class of turbulent men who had assembled for unlawful purposes, and which class in public meetings used language blasphemous, incendiary, and calculated to provoke a disturbance of the peace; that he had at divers times "endeavored to encourage and incite certain persons to keep and maintain themselves in such a manner as to be able to commit an outbreak against the law whenever he should so advise;" that he had falsely accused various branches of the city government of dereliction of duty and corruption in office, for the purpose of weakening their influence and destroying their efficiency, so that he might strengthen his own power for the accomplishment of his own unlawful ends, and his private purposes; that he had incited the poor to mob violence against individuals, and to insurrection against the state and national governments; that on one occasion he told his followers at one of their public meetings, that

he was "powerless to help them," and exhorted them to "*do no illegal thing until you hear from me again.*" Great stress was laid upon this last expression of the Mayor by those prosecuting him, as showing that he was liable at any moment to head an outbreak against the laws, while his friends insisted that it only signified that if the discontented classes were determined upon disorder or, to use a larger word, revolt, or, a yet larger word, revolution, he charged them to listen to him in a final appeal, before they "crossed the Rubicon."

The complaint further averred that the Mayor had willfully violated certain statutes of the State, passed for his official government and control, in that he asked and received "emoluments, gratuities and rewards," for obtaining positions for divers persons in various city offices, making for himself thereby "extortionate gains and profits," and that, in willful violation of such statutes, he demanded and received "free passes" from railroad companies.

On behalf of the Mayor, Mr. Highton, as his leading counsel, fought this proceeding with characteristic zeal and tenacity. His first movement was a motion to the presiding judge of the Superior Court, to transfer the case from the department to which it had been assigned, to the tenth department of the court; this court having twelve judges, sitting separately in as many departments. His motion was based upon the grounds that the case was, in legal definition, a "special proceeding," and the court had established a rule that special proceedings should be heard before the tenth department. This case had been assigned to the fifth department, whose province (not by statute, but by court rule and practice) was to hear and determine equitable cases, actions on contract, for damages, and divorce.

The motion to transfer seemed reasonable and proper. Its true "inwardness," however, was probably dictated by professional strategy, as the judge of the tenth department had been elected to his office by the aid of the full Workingmen's Party vote, while the judge of the fifth department was a strong opponent of that organization. The motion was denied—the Mayor's enemies deriving much amusement from what they called Mr. Highton's attempt to "pick his own judge." Mr. Highton next asked that the case be heard in bank and that there be a full bench. This application was denied on the grounds that there was no power in the presiding justice or elsewhere to compel the attendance of the judges, and that any one judge might prevent a trial by absenting himself; but it was ordered that the trial should proceed before as many of the judges as could be induced to attend. Accordingly, Mr. Highton having meanwhile presented a written demurrer to the complaint, five of the twelve judges—Cary, Halsey, Sullivan, Ferral, Latimer— assembled, May 27, 1880, to hear and determine the case. The public attendance was very large, and the proceedings drew the notice of many other communities. Mayor Kalloch was present, lounging in a chair with eyes

closed most of the time—his appearance and bearing thus strikingly contrasting with his impetuous nature.

On behalf of the defendant, Mr Highton made the point that the Court did not have jurisdiction over the case. The law under which the proceeding was instituted, clothed, in express terms, only District Courts with authority in such cases. A new constitution of the State had recently been adopted, wherein it was provided that the District Courts, all of which it abolished, should be succeeded by Superior Courts having the same jurisdiction. Mr. Highton argued that the law aforesaid (statute of 1873-74), was annulled by the new constitution, which instrument abolished the Courts to which it applied—that the powers of the District Court, touching this proceeding, had not been transferred to the newly created Superior Courts; that the section of the new Constitution relating to the impeachment of officers, was not self-executing, and required legislation to put it in operation. That the acts of the Mayor set forth in the complaint were not official acts, but were committed by him, if at all, as an individual. The charges were: 1. Incendiary language; 2. Corrupt procurement of places in city offices; 3. Accepting free passes on railroads. Mr. Highton argued that to effect the Mayor's removal from office for these acts, he must first be indicted for crime and convicted by a jury. He read a list of the statutes relating to the office of Mayor, showing all the duties imposed by law upon that office, and contended that no act complained of was a violation of official duty; that a broad line must be drawn between official acts and private acts. The Mayor might commit burglary and yet he could not be removed from office for that act by summary process. His removal might follow a conviction of crime, but the Act of 1874 only contemplated misdemeanors committed in the actual performance of official duty. He cited the case of *ex-parte* Harrold, (47. Cal. 149.) in which the Court held that a County Clerk who refused to comply with a law requiring him to reside at the County seat, did not thereby neglect an official duty.

The leading opposing counsel against Mr. Highton, at the close of the latter's argument on this especial point (Gen. Barnes) suggested that "as much stress was laid upon the question of jurisdiction it might be well to have that question determined in the first instance." After a recess Gen. Barnes replied to Mr. Highton, and the latter briefly closed the argument. After consideration between the Judges, the Court announced that: "The demurrer on the point of jurisdiction was overruled, and we will proceed to-morrow on your second point." The second point was this: That the acts complained of, were not committed by the Mayor in his official capacity; if at all. After further argument the Court, four of the five judges concurring, sustained Mr. Highton's position and dismissed the proceedings, thus establishing the rule that the language of the statute is to be

confined to the neglect of official duties. Judge Latimer dissented on the ground that Section 19 of Article XII of the Constitution, (declaring that accepting of free passes on railroads by any public officer should work a forfeiture of his office) was self-operative.

Kalloch died in Washington Territory in 1887. He had left the ministry and become a lawyer.

In the case of Dawson vs. Scott et al., the plaintiff, Rev. T. Madison Dawson, was pastor of a Presbyterian church in East Oakland, Alameda County, California. He suffered through an affair of the heart, and had the good sense to withdraw from the ministry. His withdrawal, which was in the shape of a letter to the Moderator of the Presbytery, was unanimously accepted by that body and his name was erased from the roll of ministers. Thereafter the Presbytery sought to arraign and try him on charges of immoral conduct. He refused to appear, and applied to the Nineteenth District Court (E. D. Wheeler, Judge), for an injunction restraining the Presbytery from taking any proceedings against him. An interesting conflict followed between ecclesiastical and civil authority.

The Presbyterian Church is an incorporated association of persons united for religious purposes, under an established system of discipline and government, prescribed in 1821 by the General Assembly of the Church. The perpetual officers are bishops, pastors, deacons, and elders, and the church is governed by subordinate councils under the General Assembly. The Presbytery is the second council in the order of progress from the church body to the General Assembly, and a quorum of its members consists of three pastors, and an unlimited number of ruling elders. It has power to remove and ordain, to admonish, suspend and depose ministers. Where a scandal is loud and action imperative, the Presbytery may be called together by anonymous complaint. While the Presbytery has jurisdiction over ministers, the body of the church deals with members. When an accusation against a minister is filed, he is cited to appear. If he refuses to appear he is cited a second time; if he still refuses to appear, he is suspended and cited a third time. Still refusing to respond, he is deposed. No appeal can be taken to the General Assembly, when the accused has failed to appear.

On August 7, 1875, Dawson aforesaid withdrew from the ministry as stated. On August 23, 1875, he was anonymously accused before the Presbytery of grave offences, the accusation being presented over the name of "Common Fame." He then applied to the Court for an injunction against the Presbytery. Mr Highton wrote the complaint and conducted the case. Ex-Governor Haight, who belonged to that church, appeared for the Presbytery. The complaint alleged that great publicity attached to investigations before the Presbytery—that the numerous newspaper organs of the church

published full proceedings, and the daily press also ; that if the Presbytery was allowed to try the plaintiff and pass judgment upon him, his standing in the community would be depreciated, and it would be difficult if not impossible for him to obtain a livelihood—the “Common Fame” indictment charging him with most unseemly behaviour and the grossest immorality. Mr. Highton on the hearing, argued that the charges involved moral turpitude, and not questions of theological faith or discipline ; they were not ecclesiastical, but affected the character of the individual ; that the action of the Presbytery was arbitrary, and that that body arrogated to itself the functions of a civil tribunal. The counsel dwelt with emphasis upon the admitted fact that Dawson had withdrawn from the ministry, and his name had been struck from the church rolls. He declared that Dawson was a stranger to the Presbytery, as much so as anyone outside of the church, and that there was no instance of an ecclesiastical body usurping and exercising jurisdiction over strangers. Religious societies were amenable and subordinate to the Courts—as much so as the Masons, Odd Fellows, Red Men and the social clubs.

Gov. Haight, for the Presbytery, contended that it was an unheard of thing for a Court to interfere with ecclesiastical authority in matters of church discipline. He appealed to the well defined principle of law that an action could not lie to *prevent* libel or slander. The redress for slander or libel was an action for damages. The Presbytery had a perfect right to try Dawson, notwithstanding his resignation. The government deals with man's body and estate, but not with his religion. If the Presbytery wanted to try Dawson against his wish, and when he was no longer a minister of the gospel, it was its exclusive privilege to do so, and no civil tribunal had any right to interfere.

Mr. Highton replied that the case before the court involved civil rights; that a man's reputation was his property. “Suppose,” said he, “that the Presbytery would prefer charges against me, and I refused to respond, and they tried and convicted me. No matter what my standing in my profession might be, I would be a ruined man. Is it not a monstrous doctrine that the courts could not protect me? — that the separation of Church and State is so complete that the courts could not interfere and save me from outrage?” Counsel insisted that there was no question of conscience before the Court, but the question was one of property. He insisted, and quoted authorities to show, that reputation was property.

The injunction against the Presbytery was granted by the Court and the matter there ended, no appeal being taken.

Dennis Kearney, the San Francisco agitator, and father of the Workingmen's Party of California, which sprang up in 1878, and lived a couple of years, inaugurated his long continued agitation by a speech in Dashaway

Hall, San Francisco, Wednesday evening, September 7. 1877. The first "Sandlot" meeting was held on the spacious open grounds near the City Hall, on the following Sunday. Kearney was the "Orator of the day." "It is said in some places that I made myself heard," declared Dennis, in a note to a San Francisco daily paper, March 6, 1882.

The communistic feeling, which is rooted in a large element of our population, found savage expression in San Francisco, in July, 1877, under the stimulus of unusually hard times. The local riots of that month were only suppressed after the law and order elements of society had organized under the generalship of the Mayor, and in addition to their moral weight, had given physical support to the police on the field of actual encounter.

Many entertain the belief that Dennis Kearney was the instigator of those riots; but as it has been just observed, he began his career as an agitator Sept. 7. 1877, whereas the riots occurred two months earlier. So that really Kearney was the creature, instead of being the author of that agitation, albeit his is the central figure as we look back to those troublous times. For several years Kearney, by his harangues delivered almost nightly to turbulent and applauding multitudes, kept San Francisco in a ferment of excitement, some of the effects of which were to frighten away millions of capital, to paralyze many industries, and if not to make the rich richer, certainly to "make the poor poorer." Proclaiming against the despotism of capital, he was ready to enthrone the tyranny of the mob. Insisting upon, and freely indulging in, "free speech," he boldly denied that privilege to all who stood in his way. So violent became his public utterances, and so threatening to civil order was the conduct of his army of followers, that the legislature, in response to popular appeal, passed, and the Governor approved, a bill punishing the abuse of free speech, which measure was styled the "Gag Law" by those for whose amendment it was designed. On one occasion, Kearney declared from the platform in a public meeting, the chairmanship of which he had usurped, that "no politician in office shall speak at a meeting at which I preside."

In the spring of 1878, as, indeed, for several years prior and subsequent, the people of San Francisco were disturbed by the question of water supply. The prices for water fixed by the Spring Valley Water Company, which supplied the various departments of the city government and the great bulk of the inhabitants, were generally regarded as excessive. Among the propositions discussed for the adjustment of the difficulty was one to condemn and purchase all the works and other property of the Spring Valley Company. The belief becoming general among tax-payers that if this were done the Company would be paid millions of dollars above the value of their property, a loud popular protest went up against the proposition. On March 16, 1878,

at two o'clock in the afternoon, a large public meeting was held in Platt's Hall to express the popular opposition to the proposed purchase. The meeting was called by several citizens, none of whom, take note, had any affiliation or sympathy with Kearney or the so-called Workingmen's Party. The attendance was very large. The committee of arrangements had selected Monroe Ashbury for President. Mr. Ashbury was an old citizen, universally honored, and had held several important local offices; but he was not the right man to meet the unforeseen crisis which was at hand. He was both honest and firm, but his firmness was that of a man of peace. He could not be driven from any position which he had deliberately taken, but he was too slow and deliberate in taking position. He was the imprudent selection of the committee. The occasion called for a bold Captain with a heart of oak. In the felt presence of such a man the disorderly scenes to be noticed would not have been.

The meeting, for some unexplained cause, was not called to order until a quarter of an hour after the appointed time. The hall was full and the audience restive, especially that portion composed of Kearney's contingent, present in large force. The chairman of the committee proposed Mr. Ashbury for President and declared him elected. Mr. Ashbury was present, but just then there were loud calls for Kearney, who took the platform, and Mr. Ashbury did not appear. Before Mr. Ashbury had been proposed, Kearney had taken the platform in response to calls, but left it at the request of the committee in charge. There is hardly a doubt that if Mr. Ashbury had been nominated earlier, had promptly responded, and had exhibited a firm attitude, all would have been well. But, as he afterwards testified, he considered the meeting had been packed, that its objects had been defeated, and he declined to serve as chairman. This unfortunate decision left the resolute intelligence of the committee represented at the meeting without a leader; and, seizing its opportunity, the Sand Lot instantly asserted sway. Kearney himself put the question as to whether *he* should be president. A loud response went up from his men, massed in the center of the hall, and he declared himself elected.

Several speeches then followed, one of them being made by Rev. H. Cox. (Mr. Cox, State Senator, Edward Nunan, and Eugene N. Deuprey, then a rising young lawyer, had been selected by the committee as the speakers of the occasion). Senator Nunan next presented himself and was introduced to the assemblage by Rev. Mr. Cox. Kearney then declared that Nunan should not speak—that no politician in office should speak at a meeting at which he, Kearney, presided. Bedlam then broke forth, and a general row was only prevented by the police who made several arrests. During the dispute between Kearney and Nunan as to the latter's right, or rather power, to speak, Mr. John Hayes, an old citizen, one of the family after whom

Hayes Valley and Hayes Street were named, went upon the platform and said to Kearney, "If you do preside over this meeting, you don't run it." Then, getting behind the "President," he pushed him off the platform into the music stand. Hayes was arrested, and Kearney and Nunan continued their dispute with voice and gesture for twenty-five minutes. Finally, Nunan was prevailed upon to retire, in the interest of peace. After a short speech from a legal light of the Sand Lot, Kearney declared the meeting adjourned, and it dispersed. Three weeks later, April 7, 1878, the trial of Hayes on a charge of battery upon Kearney, was commenced in the Police Court.

The instances are far too numerous to be noted, where peaceable and reputable citizens have been called upon to administer chastisement in cases where the law failed to prescribe any punishment; but in such instances, the result has nearly always been that the party who sought to right his wrong was himself punished by the law. Hayes of course committed an assault upon Kearney. The defence, it would seem, would have to plead that the provocation was great if not irresistible. All classes of society agreed that Hayes would be convicted of assault, and would be fined—the better classes hoping that the fine would be the lightest permissible. But Mr. Highton, who appeared for the defence and also in reality in behalf of society and the public, took the bold and novel ground that Kearney was the aggressor; that *he* had *first* committed a technical assault upon John Hayes *and upon every other citizen* who had entered Platt's Hall to further the object of the meeting; and that when Hayes pushed him from the platform, he, Hayes, acted *in self defence*, and in defence of those who had called the meeting.

Although this was only a case of battery in an inferior criminal court, it makes, by reason of the principle involved and the able and ingenious manner in which the defence was in effect turned into a prosecution, a bright chapter in Mr. Highton's forensic career. The evidence was interesting, the arguments able and instructive, and the case merited a full report, for wide dissemination in printed volumes.

Mr. Highton probably never achieved a more notable triumph. Immediately upon the close of the argument, the magistrate, Hon. Davis Louderback, rendered his decision as follows:

Under the circumstances of the case, I think the conduct of Dennis Kearney, in seizing the organization and controlling the proceedings of that meeting, was unjustifiable and illegal. I think the law views his act as an intrusion and a violation of the rights of those persons who originated the meeting, and the right of the people peaceably to assemble for a lawful purpose. This shove was given evidently, not for the purpose of an assault, but in assertion of the rights of the meeting. He did not beat him or strike him; but gave him a shove in the excitement of the moment, to assert his

right and his protest against Kearney's illegal acts. Under the circumstances, I think it does not constitute a battery, or an assault, and the case is dismissed.

The result of this trial was received with great satisfaction by the large majority of citizens. It won for Mr. Highton (who would accept no fee) the earnest plaudits of the press and people, and added largely to his fame as an advocate.

The two principal criminal trials with which Mr. Highton has been connected, presented interesting coincidences. Both grew out of assaults upon the proprietors of the San Francisco *Chronicle*, and both resulted in the acquittal of the accused. The first was the murder case of Isaac M. Kalloch, son of Mayor Kalloch, whose impeachment case has already been stated. In this, Mr. Highton was leading counsel for the defense. The accused, whose father had been severely arraigned by the *Chronicle* as being corrupt personally and officially, followed Charles de Young, the senior proprietor, into his business office and shot him down. This was in 1880. In the other case, assault to murder, the accused, A. B. Spreckles, also invaded the *Chronicle* business office and shot M. H. de Young, the sole proprietor, inflicting serious wounds. He, too, claimed to have taken arms in vindication of his father and family. This was in 1885, and in this case Mr. Highton was associated for the defence with Hall McAllister. The coincidences failed in the property qualifications of the two accused, Kalloch being a poor man and Spreckles a Croesus. Both trials progressed at great length, amid deep public interest, and in each case there was a general verdict of not guilty.

This advocate has never been charged with fighting cases by other than open methods and in open court. His sympathies have always been with the best elements in the community, politically, socially, and professionally. Having, for some years in his early manhood, been connected with the press, in all its departments, he has never underestimated its power or its usefulness, nor resorted to the publication of cards, nor engaged in unseemly squabbles with newspapers. And he has always favored a just and impartial administration of the law, through the regularly constituted authorities and not by irregular methods. In a full tide of practice for thirty years he has never had any trouble with the courts. When he has argued a case, the verdict of his brethren of the bar who have heard him, has been that he has covered all the ground. He leaves nothing unsaid, but his statement and argument are deliberate and his manner diplomatic and impassive. His notable defenses in the ten or twelve leading murder cases of this State, have inevitably spread his fame abroad as a master in that line of practice. But, with a single exception, he has never defended a party for crime who belonged to the criminal classes. Indeed, of his full practice the criminal department has not exceeded one-and-a-

half per cent, and with the opening of the year 1887 he ceased to accept employment in any criminal business whatever.

Platt & Rich, a Virginia City, Nevada, firm failed in business, owing San Francisco merchants, who, by reason of non-residence, could not attach, more than \$100,000. Judgments against them, alleged to be the result of collusion, were obtained, and all their assets were advertised for sale under execution. Mr. Highton went to Virginia City, filed two bills in equity, in the names of twenty-four importing houses in San Francisco, and, after long arguments before Judge Rising, in which he was opposed by the best legal talent in Nevada, he secured an order enjoining the sales, and ultimately captured for his clients the entire assets, amounting to some \$46,000.

In 1867 one Schmedberg was by a decree of the Fourth District Court, Hon. E.D. Sawyer, Judge, directed to make a bill of sale of the bark *Cesarewitch*. A most interesting case was this. Being then a Justice of the Peace I took voluminous testimony in it, having been designated as referee at the instance of Messrs. Hall and Cutler McAllister, to whom ex-Judge George Turner was opposing counsel.

Judge Sawyer's decree omitted the usual proviso that, if Schmedberg refused to execute the bill of sale, the clerk of the court should do so in his stead (which under the law would answer all purposes). Schmedberg did refuse to obey the decree, and was sent to jail for contempt. He employed Mr. Highton to obtain his release. Having moved for Schmedberg's discharge in the Fourth District Court, Mr. Highton was informed by Judge Sawyer that no argument would be heard. "Mr. Schmedberg," said the Judge, "will stay in jail until he either signs the bill of sale or rots." Mr. Highton then took his client by habeas corpus before the Supreme Court, and, after argument, the prisoner's discharge was ordered by that tribunal. Meeting the District Judge a few days thereafter, Mr. Highton said: "Judge, if you should come upon Schmedberg in the street, hold your nose and cross to the other side."

Mr. Highton argued all the questions in the Dupont street cases, before the Nineteenth District Court in connection with Judge Garber and Thomas B. Bishop. These cases grew out of the widening of what is now Grant Avenue, San Francisco. He participated in the argument of the actions to enjoin the collection of the Kearny street widening tax, and to recover the taxes already collected. He made arguments in both the District and Supreme Courts.

In *Brumagim vs. Bradshaw et al.*, an ejectment case of great importance for land on the Potrero, San Francisco, after an adverse decision by the Supreme Court, separate petitions for a rehearing were prepared by S. M. Wilson and Mr. Highton, and a rehearing was granted. The original decision was reversed.

It was for a long time the custom of certain practitioners in San Francisco to induce sailors and passengers to libel every vessel that entered this port, with a view to securing lucrative compromises. In the spring of 1869 thirty-nine passengers libeled a certain ship from Australia, and Dickson, DeWolf & Co., the consignees, determined to make this a test case, and employed Mr. Highton to defend. The trial lasted several weeks, and resulted in the defeat of the libelants, who, at the end of a long and able opinion by Judge Hoffman, were awarded one dollar each, without costs. In this case there was an interesting obstetrical question raised, and Mr. Highton's examination of medical and scientific witnesses was, for the ingenuity and research it displayed, warmly commended.

The case of Kinsey vs. Wallace was an action for damages for a malicious attachment. The jury gave a verdict for plaintiff, represented by Elisha Cook, for \$7,600. Judge Dwinelle, of the Fifteenth District Court, refused a new trial. On appeal Mr. Highton argued the case in the Supreme Court for the defendant, who was the appellant. That court ordered that a new trial should be had unless the plaintiff remitted \$4,000 of the sum awarded by the jury. This was an unusual decision after a verdict and denial of a new trial by the court below.

In the contest between S. F. Hopkins, the brother, and Mrs. Mary F. S. Hopkins, the widow of the railroad magnate Mark Hopkins, who left an estate of about thirty millions of dollars, Mr. Highton was the leading attorney and counselor of petitioner. He succeeded in having the widow removed from the administration of the estate on the ground that she was not competent to manage so vast a trust.

Mr. Highton has been of late years an attorney for J. B. Cox in the latter's long litigation with Charles McLaughlin, who became a millionaire as a result of extensive contracts for railroad building. Cox slew McLaughlin in the latter's office, in San Francisco, on December 13, 1883, after the litigation between them had been pending for years and had been taken to the Supreme Court three times; and he has since continued the suit against the large estate of the deceased. The killing of McLaughlin was not witnessed by any third party. A charge of murder against Cox was dismissed by a Police Judge on preliminary examination, on the ground of self-defense, Mr. Highton and D. M. Delmas appearing for the accused. Cox was a contractor under McLaughlin. As originally commenced, one of the objects of his suit was to enforce a lien for work and materials, and there were other defendants with McLaughlin. But at last the relief sought was for a personal judgment against McLaughlin. The latest decision in this tedious and sanguinary litigation, was made by the Superior Court of San Francisco, (Hon. J. F. Sullivan presiding), on the 4th of October, 1886. It was there found that Cox (and his associates, to whose interests he had succeeded), had done work

for McLaughlin, under contract, of the value of \$285,918.49, and that there had been paid on account of this, \$187,690, and judgment was entered in favor of Cox and against Kate D. McLaughlin, as executrix, for \$98,228.49, and a large amount of accumulated interest. The case is again on appeal.

During a period of several years, between A.D. 1862 and A.D. 1867, there were seizures in great number, of imported merchandise, by the customs authorities of San Francisco, New York, Boston, Philadelphia, and New Orleans. These seizures embraced among other articles, champagnes, red wines and white wines. It was sought to have these importations confiscated for alleged undervaluation. In San Francisco the litigation resulting was long and bitterly contested. The cases were severely pressed by Hon. Delos Lake, U. S. Attorney, with whom Milton Andros was associated as special counsel for the Government. Hall McAllister and Mr. Highton defended for the claimants. Perhaps Mr. Highton's best, as well as his most earnest and elaborate argument in these contests, was made in the case of "The United States vs. 180 cases of White Wine," in the U. S. District Court, Hon. Ogden Hoffman, Judge. The wine was Chateau du Vigneau, owned by the Viconte de Pontac. It was seized under a suspicion of fraud, on July 29, 1865, being the first and only seizure of that kind of wine. It had been passed by the Government appraisers. Not until the 5th day of February, 1867, over eighteen months after the seizure, was any testimony obtained in support of the charge of undervaluation. The case was tried before a jury, Mr. Highton's argument being upon the facts, and made on March 26, 1867. This argument was fully reported and sent in pamphlet form over the United States and Europe. The verdict was for the Government, under the instruction of the court, but the cause was so stubbornly contested that the trial was followed by a settlement of all kindred cases then pending.

Let me close this chapter with some passages from one of the latest, and probably the finest of Mr. Highton's orations, that delivered in 1883, August 24th, at the laying of the corner-stone of the Garfield Monument in Golden Gate Park, San Francisco. The ceremonies were conducted by the Knights Templar of the United States, then in triennial conclave. As the occasion was rare in other respects, so the audience was one of the grandest ever addressed by man, numbering, it is believed, sixty thousand people. I quote from the oration :

It is often said that the age of great oratory, of great poetry, of great dramatic works, is over. In a certain sense the assertion is true. The world of fact, with its ever-developing possibilities, has taken the place of the world of the imagination. The human mind, trained and educated by the very process of acquisition, is no longer compelled to evoke from its own mystic depths, the thought that stirs, the imagery that thrills, the dark phantoms that tear, the human heart. We live, nevertheless, in a period of terse and inspiring eloquence. Nature, with its innumerable forms of grace and beauty, addresses hourly an illuminated and enfranchised intelligence. Law, with its myriad

voices, tells us of order and of applied justice that exclude the arid theory of chance. True science, often confounded with the mere assumptions and formulas of mental egotism, spreads from pole to pole exact and useful knowledge. Discriminating history gathers up the records of the past and warns and instructs us by its lessons. The acts, the ideas, the words, of men are heralded through all the zones. And while, in the wondrous increase of organized communities, individual importance is being steadily diminished, unrestricted intercourse is blending humanity into a net-work of relations, which transcend governments and territorial divisions, and, in the midst of strife and apparent confusion, are solving the most difficult problems that have been transmitted to us through the statesmen and philosophers of six thousand years. It is not surprising that, in such a complex aggregate of realities, in which the miracle of the Creation is perpetuated and expanded, the genius of fiction, the productions even of the loftiest intellects of all time, are eclipsed. Civilization at once epitomizes and magnifies the grandest conceptions of the poets. The daily achievements of man upon land and sea, the diversified industries in which he is employed, the advance of liberty through all the grooves of trade and commerce—multiplying the comforts and elevating the general level of population—constitute a ceaseless oration, which excels the measured rhetoric of Demosthenes and of Pericles. And every man who is not a drone and an incubus, one of the supernumeraries of society, is himself an actor from the cradle to the grave in a perfect drama, which depends upon no legend for its origin, which will end only when the consummation of humanity shall be accomplished, whose Author and whose Finisher is God.

This glittering pageant, which is born not all of joy nor all of sorrow, and in which the diversities and even the antagonisms of every part of the Union are grouped and harmonized, is full of an intense significance which History will apprehend and describe, and which it is my duty to the extent of my ability to interpret.

In the presence of this vast multitude, the oldest of human institutions and the newest phase of civilization have met together, and Free Masonry, type of the severe and of the antique, has exercised a normal function by co-operating with civil society in a simple act, designed to mark a great calamity and a great triumph. The calamity was the death by violence of a man who had been elected President of the United States, and who was in himself an illustration of the excellence of our national institutions; the triumph is that of constitutional freedom and order in a continental Republic.

We are assembled here, not under the invocation of a barren science that would emasculate the world of all that is not visible or susceptible of explanation through an arrogant human intelligence, but in the name of God, the Supreme Architect of the Universe, the Creator of Heaven and Earth, the Source and Origin of the forces and laws that have developed and shaped both men and nations, to place on the extreme western verge of the American continent the foundation of a durable memorial to human progress as illustrated by American institutions and by the American people. A stone, accepted by the builders, though formally dedicated to the memory of the dead, has yet become the chief corner of an arch that extends from where the roar of the Atlantic sounds in the ears of the descendants of those who gave their life-blood to the Revolution to where the soft whispers of the Pacific tell of peace and harmony that overspread the nation. The monument at Bunker Hill, on which, from base to apex, the patriotism of Webster was poured, gives bond for the enduring gratitude of the American people to those who laid the corner stone of the Republic, and now, on the opposite shore, we propose to erect a monument, which, through an individual life and death, shall attest to all future generations the completion of its structure. The sun, pursuing its majestic course across the sky, shall bathe them both in meridian splendor, and, when its

last beams play upon the summit of the column at Bunker Hill, its full refulgence shall yet irradiate the bronzed features of our martyred President, whose personal career ended with the assured perpetuity of the Union, through the consent of ALL his countrymen.

* * * * *

I have said elsewhere that the Government of the United States is not sectarian, but that is not Pagan, and it is not atheistic. I take the liberty, and most appropriately as it appears to me in this presence, not only of repeating but of enforcing the observation. In the name of him whose memory we this day revere, I protest against the atheistic tendencies of the age, and I assert that a reverent consciousness and application of the limitations which surround our reasoning powers are practically important in the conduct of life everywhere, and above all in American communities. Even superstition is preferable to the moral and mental autopsies of narrow-headed competitors with the Almighty. The two ends of mortality are enclosed by the sphere of eternity. Applied to the standard of the Infinite the human mind is measured by the inch, and those productions which to itself appear the greatest, are often mere plays upon thought. The thankful recognition of existing truths is one thing—overweening self-confidence or inflated vanity is another. The people *can* govern themselves within the limits I have sought to describe or to suggest, but their entire strength could not alter a single law that flows either directly or mediately from the Creator. Lying and stealing could not be converted into virtues by all the voters in the United States. Their combined power could not prevent the ebb or flow of a single tide, or prolong the life of the smallest insect that had existed for its allotted time. Their will, aided by all the resources of science, could not arrest the fleeting breath of their President, made sacred to them not merely by his office, but by his personal sufferings. In truth, the only power man has over the most vital issue here is to mitigate pain and to anticipate death. I am deeply convinced that, in the training of our mental faculties, nothing can be more essential than to avoid that which, though it may be realized and acted upon as a fact, is beyond analysis and explanation, and that this proposition is pre-eminently true of American communities, in which mental activity needs to be controlled by discipline and stability. We must realize, and act upon the belief, that the foundation of all things material and immaterial is not abstract law, divorced from a law-giver; not self-generating, independent force; but GOD, a PERSONAL WILL, penetrated by the perfect attributes of LOVE, JUSTICE and TRUTH, of which the whole universe is but the multiform expression. This is the rock upon which, and upon which only, self-government can securely repose; this is the plain and massive corner-stone of the Republic.

* * * * *

I have one thought still to utter, and then I am done. It bears upon the future of our country. We must purify our party methods by a resolute submission to the people, and by the cultivation of habits of settled industry and thrift among the young. Woman must be enfranchised by industrial education. Men must be taught to respect themselves. It must be understood that all corruption tends towards violence—that fraud and force are the correlatives of each other. Office seeking is the bane of youth and the badge of degradation to the old. It means too often the struggle of incompetence and laziness to live in luxurious ease, and to obtain without effort in natural channels the fruits of labor. It should be discountenanced and abandoned.

In short, the end of all the festivities and of all the ceremonies of this Conclave Week should be better lives, and the increase of that natural and unselfish patriotism which does not evaporate in excitement, but settles into a clear appreciation of the real work the fathers of this Republic did, and into an intelligent comprehension of the obligations of the citizen and of the system of our government. The span of human life is

short, but it may be fitted into that bridge of constructed progress upon which the grand army of toilers is ceaselessly marching into a world unseen and unknown but whose foundations are in the heavens; a world of new facts, but where principles are unchanged; a world where clogs and fetters shall fall away, and opportunities multiply and expand; a world where the actual labors of the past, still exerting their influence upon earth, shall yet propel individual souls forward and yet forward, towards the fulfillment of their parts in the Providential design; a world where minds shall enlarge and become more and more illuminated, and hearts shall swell and throb with purer and purer love, and the chorus of the morning of Creation shall be revived in the joyful strains of a perfected humanity.

CHAPTER XVI.

The Shafters, Par Nobile Fratrum—Bar Leaders Who Led in the East and in the West—Oscar L. Shafter's Advice to Law Students—On the Supreme Bench of California—His Genial Nature and Thoughtful Religious Views—Henry E. Highton's Eulogy—Judge McKinstry's Estimate—James McMillan Shafter—A Distinguished Name in Law, Politics and Legislation—An Example of Devotion to Learning, Agriculture and Industrial Development—The Constitutional Convention of 1878—A Pen Portrait by Rev. Dr. Bonte—Notes of Trenor W. Park. C. H. S. Williams, Edward Stanly, and the Great Law-Firm of Halleck, Peachy and Billings.

They came not with the Argonauts. Amid that hot and hasty host, spurred by adventure and reckless of result, they had and sought no place. When Marshall's cry, "Eureka!" resounded around the globe, electrifying the continents and the islands of the sea, the men we are now to study listened to the proclamation as it echoed through their native hills, but stood "unshaken" and "unseduced." Not unconcerned, not insensible to the possibilities, nor deaf to the promises of the hour; but the fever of youth had abated, the first hard struggles of manhood were over, they were in the meridian of life, had won reputation, were raising families, and were quietly and surely extending their fame. With sympathetic heart and philosophic eye, they saw the mighty human tide roll westward. They waited and watched. Soon they beheld the first fruits of the great movement, and were satisfied.

"They came, the founders of a state,
The men with spirit brave and free,
Who snatched the magic wand of fate,
And shaped their own high destiny."

Oscar L. Shafter, like Joseph G. Baldwin, came to California in 1854; like Baldwin, he had given the new Dorado the benefit of the sober second thought; like Baldwin, all of his children were born before his removal; like Baldwin, he was destined to adorn the highest judicial station in the new State; and, like Baldwin, the length of his official service was four years. These little coincidences seem to be worthy of mention, as the characters and politics of the two men presented a striking contrast, and we are to have the pleasure of seeing Baldwin later on.

Oscar Lovell Shafter was born on the 19th of October, 1812, at Athens, in Vermont, which Dr. Bellows, in his centennial discourse on the Life and Works of Channing, declared to be "the most American of American States." His grandfather, James Shafter, was a revolutionary hero, being conspicuous in freedom's army at Bunker Hill, and Bennington and Saratoga. For twenty-five years he was a member of the Vermont legislature. His son,

Oscar L. Shafter's father, became the Judge of his county, a member of the Constitutional Convention of 1836, a legislator of his State, and an unsuccessful candidate for Governor. His business was that of a farmer and merchant. Our subject was educated at Wilbraham Academy, Massachusetts, and the Wesleyan University. After a brief experience in a law office in Vermont, he entered Harvard University, from which he was graduated as a law student in 1836. He immediately commenced law practice at Wilmington, Vermont. I sketch him as a Californian, and therefore epitomize his career in his native State. Like his father, he became a candidate for Governor, and, like him, was unsuccessful. His party—the young Liberty party, so called, also presented his name for Representative, and afterwards for Senator in Congress. He was an original abolitionist, not bigoted, however, in his views. He saw that the institution of slavery challenged the serious attention of the statesman, and presented a question upon which the most wise and magnanimous might disagree. He fought the institution until its downfall; then his joy over the freedom of the slave was tempered by his sympathy for the dethroned slaveholder, who once proud and powerful, suddenly found himself reduced to poverty and distress. In early boyhood he lost his mother, who is represented as a woman of superior endowments, majestic in form, with a countenance of infinite expression, and possessing rare conversational and social qualities. In 1840 he married Miss Sarah Riddle. There were eight children of this marriage—seven daughters and a son.

After eighteen years' practice, in which he won his way to the front rank of the bar in Vermont, he determined to remove to San Francisco. His family was large and his fees were small. There was not much litigation in that old land of settled titles and "steady habits." His friend, Trenor W. Park, had preceded him, and built up in the new city on the Pacific a very extensive law practice. Park was a member of the great law firm of Halleck, Peachy, Billings & Park. The magnitude of the business dispatched by this firm in the course of a few years was astounding. Although comprising four young, active and ambitious members it needed further aid and counsel. At the suggestion of Mr. Park the firm sent to Oscar L. Shafter an invitation to join them as office lawyer and adviser. As the invitation was accompanied by an offer of \$10,000 per annum, it was promptly accepted. Mr. Shafter, leaving his family at home, proceeded to San Francisco, where he arrived November 13, 1854, and immediately entered upon the duties of his profitable engagement. He kept the position but one year, when the firm was dissolved by the withdrawal of Mr. Park. The latter, with Mr. Shafter and General C. H. S. Williams, formed a new firm, under the name of C. H. S. Williams, Shafter & Park—the initials of General Williams being used in the firm name because there was another Williams at this bar at that time. The late William Hayes was clerk for the new firm.

During the year of Shafter's connection with the firm of Halleck, Peachy, Billings & Park, he kept a private journal, which is still preserved, in which he recorded his daily thoughts upon all kinds of subjects—books, law, men, society, climate, scenery, etc. This journal reflects an analytical, philosophical mind. About November, 1855, William Hayes quit the service of C. H. S. Williams, Shafter & Park, and formed a partnership with Hon. Edward Stanly. Stanly & Hayes had offices in Naglee's building, Merchant street, near Montgomery, and their offices adjoined those of Mr. Shafter's firm, which had removed there from the rooms ever since occupied by Colonel J. P. Hoge. Both of the firms named were conspicuous in the long litigation and complicated troubles which resulted from the failure of the great banking house of Adams & Co. Shafter was counsel for the house. Park was the especial friend and adviser of Alvin Adams. Williams was counsel for Palmer, Cook & Co., another powerful banking house, which also failed. It had been agreed between Williams, Shafter & Park that each should retain his own clientage obtained before the partnership, without accounting to the firm for the receipts.

This was a perfectly organized law office, having its bookkeeper and cashier, its corps of clerks for the various departments, all under a competent head, and its own private notary. At the end of the first year's business, in 1856, this firm had realized the sum of \$110,000 above all expenses. And the expenses, it will be seen, must, considering the times, have been enormous. In addition to the large sum named, each partner took in many handsome fees from his own particular clients. In 1856, James McM. Shafter arrived from Wisconsin, whither he had emigrated from Vermont some years before. He had won some fame as a lawyer in Wisconsin, and had been the candidate of a defeated party for Lieutenant Governor of that State. He was received here as a big legal gun. By the mediation of his brother, a partnership was at once formed between James McM. Shafter and E. B. Mastick. This association was very brief, and upon its termination, James McM. Shafter was employed as an assistant by Williams, Shafter & Park. This firm made a powerful combination. Trenor W. Park was an able and adroit business manager. He had little to do with the preparation and presentation of causes. He was an active man, who loved outdoor life, and had a wonderful faculty of acquiring business. He amassed great wealth here, which he took back with him to Vermont, where he resumed his residence. The same is to be said of Billings. Park aspired to the United States Senate before withdrawing from this State, and hoped to represent Vermont in that body. He was small in stature, dressed well, and surveyed all things with the eye of keen and close calculation. John G. McCullough, once Attorney General of California, married his daughter, and followed him to Vermont.

Shafter, "the middle man" of this firm, was its balance. He was wise in council and impressive in the forum, a man of erudition, a thorough lawyer; massive in intellect as in physical build; in habits maintaining regularity; frugal, abstaining from drink, but a hearty eater, and a firm chewer of tobacco. He was a man of unflagging industry. His life was a laborious one, and presents another example of the rewards which patient and intelligent and unremitting effort will secure. It was his invariable practice, before his family came from the East, to be at his office at seven o'clock in the morning, going at once into his library. From that hour until late at night, except when in court, he kept at work. There were few families here in those days—the community was made up chiefly of single men and men who had left their household gods in other lands. A large amount of law business—office business, matters of counsel, etc., was done at night. This was to accommodate business men who in those rushing days hated to leave the precincts of trade while daylight lasted. The principal law offices were kept open until ten and eleven o'clock P. M. Shafter was the first to reach and the last to leave the office. In 1856, his family joined him, and thereafter he arrived later and departed earlier. General C. H. S. Williams, the other member of the firm, was a lawyer of the first class, but was prone to bacchanalian pleasures; too often erratic he was always conscious of his great powers, and sometimes, after a long "rest," he would work up his causes with marvelous application. He died by his own hand. The record of his life is invested with much interest. About 1857 General Williams retired from the firm, which immediately received the accession of James McM. Shafter and Solomon Heydenfeldt, and business was continued under the firm name of Shafter, Park & Heydenfeldt. Not long afterwards Judge Heydenfeldt (who had been upon the Supreme bench) withdrew, and the firm became Shafter, Park & Shafter. About this time Shafter wrote in his diary:

"At home, the familiarity that I had attained with the routine of questions ordinarily litigated, and, perhaps, the firmly established position that I had secured among the lawyers of Vermont, left me, with my easy and sluggish temperament, with no incentive to exertion, except a simple desire for further excellence. But here constraint and unremitted occupation furnish new inducements, which supercede all inclination to indolence by intense activity and the higher modes of moral and intellectual life."

Under a severe and solemn exterior was concealed in Oscar L. Shafter a great vein of humor. He was a man whom the lighthearted and gay would avoid, not knowing him, but he was as fond of a joke, and loved to tell or hear a good story as much as anybody. And, it may be said, he was not over punctilious in the kind of stories he told. However, he was certainly of a reflective, philosophic cast of mind. He was particularly familiar with English literature, as his brother James is with history. In conversation, he

was flowing, happy, kind, genial, informed. Especially at home, at night, when he would talk about the poets, or upon any topic which he might pick up as a theme of discourse, he would be listened to with the same close attention which the professional lecturer exacts and appreciates. The learned divine, Hamilton, of Oakland, had it from Shafter's children that they, on such occasions, "lived upon his words and looked upon him with an almost idolatrous reverence." In the treatment of all subjects he was comprehensive. He surveyed and took in the whole theme. He was fond of philosophizing on all current questions that presented novel points. He dealt in principles; and it was from rigid application of principles, and broad generalization, that he arrived at his conclusions. Before a jury, his style was a little stilted. In equity, he was ornate, pleasing, finished, forcible. While his methods at the bar—his investigation, his preparation, his presentation—were the admiration of his associates and of the judiciary, it must yet be recorded that his judicial career was a disappointment to the profession—that is, his judicial successes were not commensurate with his triumphs at the bar. In January, 1864, nearly ten years after his arrival in California, he took his seat, the elect of the people, on the Supreme bench of the State, as an Associate Justice. His decisions are comprised within eleven volumes of the Reports, volumes 24 to 34, inclusive. During that period some nine hundred decisions were reported, of which Shafter wrote one hundred and forty. His first opinion excited considerable amusement among lawyers, by reason of his unwitting frequency of repetition of the appellant's name. The appellant was one Bruzzo, convicted of murder in the second degree. The judgment was properly affirmed, but Judge Shafter, in an opinion of seven pages, comprising 252 lines, used the name "Bruzzo" 57 times, being an average of once to every four lines. In some places it was used in every line for many lines in succession. (People vs. Bruzzo, 24 Cal., 41.)

His decisions, in their conclusions, have been rarely questioned. The late John W. Dwinelle declared that "they presented constantly the ruling presence of that faculty which combines the similar and rejects the dissimilar, and descends from the general to the specific." Judge Shafter was elected for a term of ten years, but, after serving four years, he was constrained, by a consciousness of failing powers, to resign. On December 31, 1867, he withdrew from official as well as from professional life forever. He began the year 1868, in one sense, a free man, but he was a ruined man. Softening of the brain had stealthily approached. As Rev. Horatio Stebbins somewhat magniloquently expressed it, "He could no longer grasp the isolated fact, and bind it in eternal fealty to its principle." Having accumulated a considerable fortune at his profession, and being now threatened with a total eclipse of his powers, he had no incentive to effort. He crossed the Atlantic, visited the great capitals and classic spots of Europe, and died at Florence, Italy,

after five years wandering, January 22, 1873. His remains were brought back to this State and were interred at Oakland on Sunday, March 24, 1873, the funeral taking place at the First Congregational Church. On that occasion Rev. Mr. Stebbins, who had been an intimate friend of Shafter and had studied his character, made some touching and thoughtful remarks. He represented the distinguished dead as having been "a man of good sense—practical, yet with wide discourse of intelligence and reason; calm, unimpassive, yet of fine sensibility and true poetic feeling; and his whole nature, by the eternal weight of moral gravity, swinging toward the truth." On the following Sunday, Rev. Mr. Hamilton, of the Independent Presbyterian Church, of Oakland, delivered a memorial discourse.

"At the noon of his powers, and after he had come to this State, I hear him accusing himself of having too much neglected the reading of his Bible, and expressing his wonder at the power with which utterances came home to his heart in his peculiar circumstances here. He tells us also of a new light of immortality breaking in upon his mind on one occasion while he knelt in prayer. Here is proof, also, of the keen appreciation with which he read the Divine Word, in a comment on that verse of a Psalm which reads, Stand in awe and sin not; commune with thy own heart upon thy bed and be still. He wrote: 'Crawl not like a worm—stagger not like one in delirium—fly not like a coward, but stand erect and firm. But stand in awe. How much is there to awe the heart of man in the visible creation, in the earth and in the heavens, but in the contemplation of himself there may be revealed to him deeper mysteries and a yet greater glory visiting him with an awe yet more profound.'"

The following appears in a letter of Judge Shafter's to his family, written for the benefit of his only son, who afterwards died at the age of seven years:

"I trust that my boy will be a *good* lawyer, which is the same thing as saying, I trust he will be a good man—free from all chicanery, honest in his dealings with court and jury, and perfectly truthful in all his relations to his clients. There is no calling in which a strict obedience to the maxim that "honesty is the best policy" is more available. A rogue of an attorney is sure to reveal himself in his true character, and then there comes all at once from all honest men a retribution of distrust, aversion and contempt; and no matter what may be his learning or his talents, a withdrawal of business inevitably follows the withdrawal of confidence."

In his journal, after commenting upon a life of Lord Mansfield, which he had been reading, he says:

"I began with the most general principles of the science of the law, and from them proceeded to principles that were relatively subordinate to them and so on through series after series of dependent truths until the final details had been examined and exhausted. In other words, I began with the genera, from them proceeded to an examination of the different *species* included in each *genus*, and from them to individual truths of which those species were severally constituted. It will be obvious to every one that the memory must be most powerfully aided by this method of study. The principles of law, though in one sense their name is legion, all bear relations to each other, and, taken together, form a system; and, if once mastered in those relations, so long as one of these principles is retained by the mind the principle of association gives signal aid in recalling the others. I have for the last fifteen years prosecuted all my professional studies on the above plan, and although my memory is not remarkably tenacious, I have

had no difficulty in remembering, when once acquired, all the details of legal truth that can be brought within the scope of legal principles. When I read a new decision, I always ask myself the question: 'Whereabouts in the system of the law does the result ascertained belong?' In the twinkling of an eye its appropriate place is at once suggested to my thought, and I put it in its place, and I stop and look at it there, and I find by experience that it is very apt to stay there without watching until I want it."

The following letter, written by Judge Shafter in San Francisco to his wife in Vermont, was read by Rev. Mr. Hamilton on the occasion of his memorial discourse before mentioned. It gives me pleasure to hold up here a production so full of pathos, tenderness, sympathy, meditation, and religious philosophy.

SAN FRANCISCO, July 28, 1855.

Yours and E.'s of the 24th of June is received this day, and brings me good news, for it assures me that you are all alive and well. I have received, since I have been here, so much bad tidings from home, that I open every letter with fear. But I trust that the full measure of chastisement is filled, and that the residue of wrath will be mercifully restrained, until, at least, our bleeding wounds shall have time to heal and the failing heart to recover its constancy, firmness and repose. The bitter agony, the deep, uncontrolled and uncontrollable wailing, the ceaseless repinings, are over with me. But still, I remember what I never can and never desire to forget. In the hurry of business, in the excitements and exhaustion of daily labor, my thoughts are with the dead; and at night, in the silence of my bed chamber, they fly away like the dove from the ark of Noah, and seek the babes and strive for communion with them, in the habitations where they all dwell together. Their deaths have taught me lessons, and have suggested and forced upon my attention views of life and death, of the present world and of that which is to come, to which I have long been measurably inattentive. With my general theological opinions you are acquainted—they have undergone no essential modification or change. They are the opinions which the lamented Dr. Channing has so fully illustrated in his sermons, and of the profitableness of which his whole life was a beautiful and all but faultless exhibition. Those doctrines reveal God to us as our Father—our *Father* in the highest and profoundest import. They further inculcate that he has a will concerning us—they give to that will the authority of law—they recognize human obedience as a duty, and make certain fixed consequences result from obedience and another set of consequences the unchangeable and inevitable fruit of transgression. They teach us that the conditions of happiness in the future life are the same as those of the present; that death is a natural change only, and that the soul enters upon the future life with the same character it bore when it left this, and that in the world to come it will advance, if it advance at all, by the same means that it works out its own character and tone in the world that now is. But these doctrines further reveal to us that in the progression of the eternities of God the soul will, of its own intelligent election, cease from its warfare against its own highest good, and ceasing to do evil will learn to do well—at last. In these views there are presented most powerful motives to present obedience; whatever purification from sin and its contaminations is accomplished here, but hastens the hour of contemplated regeneration hereafter—while every evil act performed here, every evil thought indulged here, but delays and postpones the period of redemption. This theory of rewards and punishments recognizes the great primary truths of human accountability—presents adequate encouragements to virtue and discouragements to vice, invests the soul with all needful powers for the achievement of its own highest good, and by making the ultimate attainment of

that good an universal truth, vindicates at once the goodness and the wisdom of God in man's creation. E. asks, "Why are the young and beautiful snatched away and the aged permitted to remain?" It is a question that has often, very often, been asked before, and the most satisfactory answer that I have ever heard is that it is *the will of God*. We are born to die, and to die is but to live again. We live here, then, simply that we may live hereafter, and that final, that higher, better and truer life is sure to follow life here, irrespective of its *duration*. The little child whose space is told by months alone is as sure of its immortality as the grown man who dies weary and worn with the weight of years. The latter dies amid the shadows of evening following the endeavor and the exhaustion of a lengthened day; the former in the dewy freshness and soft effulgence of the early morning—this is the only difference. God wills it, and my daughter must reflect that He doeth all things well. I am more than gratified that you have learned what it is the end of all time to teach, the futility of earthly hopes, and that all substance, all reality, are beyond the bourne to which we hasten! Yet life here should not be set down as unimportant and valueless, for it is one of the appointments of God, which He has brightened with prospects and ennobled with duties, and they should be cheerfully and faithfully performed. They press upon us from day to day; we wake to them every morning; they challenge our attention and our efforts every moment, and wait patiently upon our slumbers during the silence and darkness of night; they should be performed cheerfully, courageously and in the patience of hope. There is impiety in saying "I am weary of life." While it is continued, it should be cherished and improved. Viewed in its just relations to that which is to come, its importance is magnified, and its deeper import fully revealed.

In the Supreme Court, November 23, 1873, an interesting sketch of Judge Shafter's life and "an analysis of his intellectual and moral character," prepared by John W. Dwinelle on behalf of the bar, was read by ex-Chief Justice S. W. Sanderson, and was spread upon the minutes of the court. It was also, by order of the court, published in the reports. In the Twelfth District Court remarks were made, January 27, 1873, by Henry E. Highton and Louis Shearer. Mr. Highton spoke as follows:

He looked great and he was great. Whether he addressed a Court on a complicated question of law, or a jury on issues of fact—but especially in the former situation—he was always sure of an audience. Here in this Court room, I can recall his massive head and his grand face, marked with the furrows of thought and the lines of a strong individuality, as with perfect self-possession, which rarely forsook him, and with Shakespearean richness of language and imagery he depicted to twelve enraptured jurors, the nature and importance of circumstantial evidence. I can remember, with startling vividness, the intense dramatic power as distinguished from the melodramatic *semblance* of power, with which he adjusted the governing facts to the governing principles of his case, until the mental picture literally glowed before his auditors. These were the Angustian days of our local bar. Randolph and Lockwood, McDougal and Williams, Baker and Tracy, gave to our forensic contests rare life and earnestness. But in the crowd of able men—some of them still connecting the old generation and the new—who then adorned the profession, Judge Shafter stood probably the central figure. In closeness of logic, in extent of erudition, in verbal eloquence, in wit, in humor, in satire—in any one of these varieties of power, he may have been equalled possibly, but not excelled. In all combined he was assuredly without a peer. His faculties were large and precisely balanced. His learning was deep and thorough, and in the crucible of his brain all obscurities vanished. His language was affluent and flowed from him in an uninter-

rupted stream, but every phrase embodied a thought and every thought was a link in the chain of a compacted argument. His illustrations and metaphors were numerous, but unforced, and they poured themselves naturally into his speech from the resources of a most retentive memory and vivid imagination. He often talked about law almost in blank verse. And yet he was never charged with diffuseiveness, or with false or improper reasoning. He kept his subject and his object continuously before him, and though his faculty for combination was so great that he could be rarely anticipated, he never sat down until every point he sought to make was definitely and completely revealed. In the mixed science and art of pleading he became almost as profound as Gould, the condensed Chitty of America. And, having thus explored the channels through which the law flows, he carried his explorations to the very source from which they were fed. He was no "case lawyer"—that half-made up creature of the modern codes—but a lawyer so full in his knowledge and so accurate in his conception of principle, that the cases were the mere filling-in of his arguments. He worked steadily, and prepared systematically for the numerous trials in which he was engaged, but he relied on the merits of his cause, and scorned the petty stratagems and bald pretences, through which genuine capacity is so often counterfeited. He possessed remarkable continuity of thought, and was capable of perfect abstraction when examining a legal question. He wrote with order, perspicuity, and facility. His early opinions, when on the Supreme Bench, exhibited the superiority of his integrity to all partisan influences, and also, perhaps, to too great an extent, the extreme nicety of his analytical faculty, but he soon acquired a terse and pointed judicial style of composition, which is a model for his successors. He was a man who had little regard for reputation, which is usually determined by mere accident, caprice or prejudice; but he had much regard for character. He was not "careful for the shadow of a great name." His thoughts ran far below the shallow politics of the day, and the false issues upon which partisans are frequently divided. He was disgusted with the corruptions of party, and he fully appreciated—what his own life and death so clearly demonstrated—the shortness of the public memory and the illusiveness of popular favor. To legislative honors, therefore, for which he was often pressed, he would not aspire; and though he would have restored to the Senate of the United States something of its ancient renown, he never cared to go there. He coveted no dignity, even in the line of his profession, and he ascended the Supreme Bench with unaffected reluctance. There was in his nature a rich vein of romance, and heroism. He was constitutionally fervent, but was schooled to self-repression and to the casual acquaintance or superficial observer, betrayed little of the real treasures of his intellect and heart. But let him read to an appreciative friend, or among his own relatives, some story of disinterested sacrifice, or noble daring, and his eye would glisten, and his voice tremble, until it became apparent that his inmost being was shaken. I have seen him so moved that his face shone with "the noble rage of battle," or quivered with almost womanly tenderness. His personal characteristics were most attractive. He had an inexhaustible fund of stingless humor, and was as thorough in enjoyment as he was in labor. He was very patient and self-contained with all men, but very genial with the young. He was firm in his own opinions, but tolerant even to the prejudices of others. He abhorred scandal, and spoke no evil even of his enemies. He disliked the pretensions and hypocrisies of conventional society and, apart from his business, lived a very secluded and domestic life. He was in the strictest sense exact. He gave to all men their own and required his own from them. And he was neither ostentatious nor prodigal in his charities. He never reached the public through the coarse modes and thin disguises of our periodical philanthropists. He encouraged neither idleness nor vice, and he investigated before he gave. But he missed no opportunities, at whatever cost, to make

legitimate investments in humanity. He had in him the elements that make a man and prepare an immortal. He was great in mind and great in heart. And somewhere among the stars, in increased strength and beauty, his soul and spirit live, undisturbed by physical pain and weakness. While he fulfils his mission there, his influence shall survive here, even though his memory fail among men.

Judge McKinstry responded as follows :

I have had occasion to study the peculiarities of the more distinguished members of the bar, and of Judge Shafter I observed that his logical arrangement was always happy, the language which clothed his argument generally, if not always, appropriate. Ordinarily, his words were the simplest and purest English, but he could indulge in quaint and sudden turns of expression which recalled for an instant the latent humor of the man, and were sometimes wonderfully efficient, presenting a moral demonstration in a single picturesque phrase. He was ever prepared to illustrate his theme by the results of a most extensive and varied reading. He was, in short, a learned lawyer of an older school, whose mind had been thoroughly trained and shaped in the principles of the common law, and he resorted to codes and statutes only to ascertain how far the common law had been departed from. Yet, in a proper way, no one was more progressive than he, none more capable of applying principles—in themselves unchangeable, because based upon immutable justice—to the complicated relations of our day. He was a man of independent views and heart. His political opinions were avowed openly, and urged strenuously at a time when they had been adopted by but a very small minority; his moderation and magnanimity in the hour of triumph might well have been imitated by those who had become convinced of the correctness of such principles only when their triumph was imminent. My personal intercourse with Judge Shafter was always pleasant. I recall his genial manner in private life, at the bar his courtly bearing to bench and counsel. He was a most successful man, in a worldly sense. He was most successful, not only in such sense, but in that he had established a distinguished name long before he had ceased an active participation in the busy scenes of professional life. It was very sad to hear that his great reputation—a splendid column—towered toward the last amidst the majestic ruins of the intellect which had builded it. But his friends may well believe that this best of memorials will continue to stand—*monumentum aere perennius*—while learning and ability shall be respected in the profession he adopted.

Although, as stated, Judge Shafter had his humorous side, not many of his jests are remembered, for this was not one of his distinguishing features. He was once addressing Judge Edward Norton, in the Twelfth District Court, and was pressing with much pertinacity a defence quite technical. Judge Norton, interrupting him, said : " Mr. Shafter, it seems to me that that is a very nice distinction which you are laboring upon." Shafter replied: "Your honor! That science of which you, on the bench, and I at the bar are alike earnest votaries, what is it but the science of distinction?"

Judge Shafter was made, a good many years before his death, an LL.D., by the College of California, which was founded by Professor Henry Durant, and which was the forerunner of the State University. He was always an active friend and helper of education. He was a very careful business man, but gave liberally in charity. It should be stated that upon the death of Judge Shafter, the New York *Evening Post*—Bryant's paper—published some original and affecting lines to his memory.

Judge Shafter's widow removed to Boston, in the enjoyment of a considerable fortune, the product of her husband's professional practice, which was all accumulated in San Francisco. The oldest daughter married Mr. Charles Webb Howard, of San Francisco. This is the "E" (Emma) to whom the Judge referred in his letter given in full above. The second daughter, Mary, is the wife of Mr. John Orr, of Orr & Atkins, of San Francisco. This lady, in addition to beauty of feature and graces of manner, is a woman of wide information and great strength of character, and inherits in a great measure her father's qualities of mind.

Judge Shafter was sadly disappointed for a long time in having born to him no boy to perpetuate his name. Devoted to his daughters, he yearned for a son for many years, until, at last, one arrived. It was a cruel visitation that took from him this boy at the age of seven years. About the year 1856 a gentleman who was an assistant in his office became a father of a girl. The morning after the event, Mr. Shafter (he was plain Mr. then) went up to his employee's desk while he was engaged in writing, and placing his hand upon his shoulder and calling him by his first name, said :

"Well, —, they tell me there is a new arrival at your house!"

"Yes, Mr. Shafter; that is a lively truth."

"And they tell me it is going to wear a sun bonnet," said Shafter.

"Yes, Mr. Shafter; that is true, too. This comes from my being in your office—from my intimacy with you."

"I should prefer," retorted Shafter, after a moment's surprise, "that you would attribute it to your wife's intimacy with—*mine*."

Whereupon, Shafter, Park and the assistant aforesaid, all took a fresh "chew" of tobacco from a big box which they kept in common.

JAMES McMILLAN SHAFER, brother of the preceding, is probably the only man living who has won distinction in three widely separated commonwealths. In all he has been alike conspicuous in law, politics and legislation. He was born in Vermont, May 27, 1816. Upon graduating from the Wesleyan University, Middletown, Connecticut, he commenced law practice, having prepared himself for the profession while a student at the University. He was soon elected a member of the lower branch of the Vermont legislature and served a term. From 1842 to 1849 he was Secretary of State. In the latter year he fell in with the great current of life rolling westward, but stopped in Wisconsin, where he remained six years. In politics he was a Whig, and, so far as political advancement was concerned, he found that Wisconsin was a less favorable field than Vermont. His district was strongly Democratic, the heavy German element then siding with that party. In 1851, however, he was elected to the Wisconsin Assembly, and was made

Speaker. In 1852 he ran for Congress. So marked was the popular recognition of his ability and integrity that, although defeated, he received a thousand more votes than General Scott, his party candidate, for President. He was nominated again for the next term, but declined.

In 1855 Mr. Shafter was invited to California by his brother, who was doing an immense business in partnership with General C. H. S. Williams and Trenor W. Park. He had just been nominated for District Judge, and it was generally agreed that he would be elected, but, acting on his brother's advice, he declined the nomination, and came to California, reaching San Francisco, December 15, 1855. To illustrate the extraordinary alertness of both mind and body, which has always distinguished him, it may be stated that he landed from the steamship at six o'clock in the morning, visited his brother's office, engaged lodgings, formed a partnership with E. B. Mastick, and at ten o'clock of the same day was at work reforming pleadings in a leading case.

Mr. Shafter's association in business with Mr. Mastick did not last long. His brother's firm offered him a tempting salary to assist them, and he accepted it, entering their office within a few months after his arrival. About 1857, on the withdrawal of General Williams from the firm, a new association was formed between Oscar L. and James McM. Shafter, T. W. Park and Solomon Heydenfeldt, under the firm name of Shafter, Park & Heydenfeldt. Not long afterwards Judge Heydenfeldt withdrew, and the firm became Shafter, Park & Shafter.

In 1862-63 Mr. Shafter represented San Francisco in the State Senate. He was made President pro tem., and presided over the High Court of Impeachment, which removed Judge James H. Hardy from the bench of the Sixteenth judicial district. He was a leading member of the Constitutional Convention of this State in 1878. He was, afterward, among the strongest opponents of the instrument which was framed by that body and adopted by the people. A member of the Judiciary Committee, his views upon the very interesting question of Judge Fawcett's right to a seat in that body, commanded wide attention. Judge Eugene Fawcett, an able lawyer, was elected a delegate to the convention from Santa Barbara county. He was, at the time, the Judge of the District Court of the First Judicial District. The old constitution provided that district judges, while such, were ineligible to hold any other *office*. The question was, "Was the position of member of a Constitutional Convention an *office*?" Judge Fawcett's seat was contested, and the matter was referred to the Judiciary Committee. It provoked warm discussion in the committee and in the convention. The majority reported in favor of awarding the seat to Judge Fawcett, and the report was adopted. Mr. Shafter wrote a minority report, which was signed by him and two others. In this paper he presented a masterly argument in

support of his view—that if Judge Fawcett were admitted he would be holding two offices at the same time. Judge Fawcett claimed that this was in no sense an office in the meaning of the constitution, and that even if it was, the people had the right to say who should represent them in a convention to frame an organic law; that if the people of one generation had a right to dictate to the people of the next they had a right to say how and what their descendants should do, and we would virtually have no power to alter or amend the organic law.

Mr. Shafter expressed his unqualified dissent from this doctrine, and pronounced it unfounded and dangerous. In this report he incidentally declared that the opinion of the Supreme Court in the case of the People vs. Provines (34 Cal., 520) was not sound and was not entitled to very favorable consideration. (This opinion, by Judge Sanderson, established the right of the Police Judge of San Francisco to appoint policemen.) Mr. Shafter said it controverted the soundness of a long and unbroken stream of California decisions.

The first leading case in which Mr. Shafter was engaged was that before alluded to, upon which he went to work on the morning of his arrival here—the case of Birrell vs. Schie, which went to the Supreme Court and is reported in the ninth California, page 104. The principle was here established that the *debt* can be followed through several successive mortgages, notwithstanding the discharge of all those intermediate, and the taking of new obligations surrendering and canceling the old. In the same volume of reports is the case of McMillan vs. Richards, in which the nature and law of mortgages as they exist in this State, the necessary incidents of redemption from foreclosure sales, the effect of protest upon payment were clearly fixed. The examination of authorities and the brief upon the prevailing side were made and prepared by Mr. Shafter, jointly with his brother and Judge Heydenfeldt. In Seligman vs. Kalkman (8 Cal., 207), which was conducted by Mr. Shafter through all the courts, it was decided that no title passed in case of a purchase of goods by an insolvent who knew of his own insolvency at the time. The doctrine of this case was subsequently modified by the court. In Green vs. Palmer (15 Cal., 411), Mr. Shafter succeeded in overturning a decision of Judge Norton, of the Twelfth District Court, and procured from the Supreme Court a decision which amounts to a treatise upon the subject of redundancy in pleadings. The opinion in this case was written by Justice Field. He has been prominent in many other cases involving principles of pleading and construction of statutes, in which his views were accepted by the court, and have become settled doctrines. In 1861, while in the State Senate, Mr. Shafter made an effort to have enforced the constitutional principle that all property should be taxed. Failing in that he instituted the action of the People vs. Shearer, Assessor of Marin county, to have the claims

to the possession of lands, the title to which was in the government, assessed and taxed like other property. He conducted this case, and procured a decision requiring the taxation of these lands against the claimants, notwithstanding that the title was in the government.

The last case of importance tried by Mr. Shafter before a partial withdrawal from practice was the matter of the probate of the will of James Black of Marin county. Black's estate was valued at \$800,000. He left a widow and a grown daughter, the wife of Dr. Birdell of San Francisco, the child by a former wife, who was a native Californian. He bequeathed his large property to his wife, but had some years before presented to his daughter a farm and made her advances—the whole amounting in value to \$100,000. The daughter contested the will, alleging her father's unsoundness of mind. Mr. Shafter, with Judge J. B. Southard and Mr. J. M. Seawell appeared on her behalf, while the widow had for counsel Mr. S. M. Wilson, Alexander Campbell, now of Los Angeles, and Sidney V. Smith. There were three long and exhaustive trials of this celebrated contest in Marin county, the jury disagreeing each time. The case was then removed to San Francisco and tried before Judge M. H. Myrick, then our Probate Judge. This last trial lasted three weeks and resulted in the breaking of the will, and the estate, after many generous slices had been cut out of it by counsel, was divided between the widow and daughter.

Mr. Shafter has always manifested a lively interest in agricultural pursuits. He has been President of the State Agricultural Society, and in September, 1878, he delivered a long and thoughtful address before that body. He is an owner and breeder on a large scale, of blooded horses, cattle and other stock. Simple in his tastes, plain in his speech and dress, regular in his habits, he has been a toiler all his life. He believes in work, and has repeatedly offered prizes to young people to encourage them in their struggle, and to impress upon their mind a sense of the beauty and dignity of labor. One of his cleverest and most characteristic acts in this line was the plate presented by him to a young lady at the State Fair in 1880—a prize won by her for baking the best loaf of bread, there being many contestants from all parts of the State. On presenting the prize Mr. Shafter said :

I do not think that baking a loaf of bread is the highest duty of a girl, but I do think that to become an accomplished housewife is not only one of the first, but one of the most imperative duties of women ; and it is to direct attention to, and to create in you a belief of this fact, that I offer you this premium.

I have called you ladies. What is your title to this appellation ? There are titles of birth, place, honor and worship ; these are of right. There are also titles of courtesy, and in this country lady is one. It is true there are some who strive to confine this title to those esteemed of the highest in social position. But this assumption is denied by most, and the title is generally applied to all respectable women of tolerable manners. But I feel constrained, young ladies, to put you upon a higher plane than most, and to assert

for you the highest and most time honored claim to this honorable name. Indeed, you alone inherit it from that time when the memory of man runneth not to the contrary. Some hundreds of years before our era the Greeks and Romans made large conquests in Asia, the birthplace of the human race. They brought back to Europe the spoil of nations, captives, theology, and the productions of nature, including animals, fruits and grain. It was in this way that wheat was diffused throughout Europe, and soon furnished bread for all. While the warlike men from the north of Europe were making their excursions by land and sea, the mistress of the household cared for the wild brood which remained. She prepared the stores of hard bread, which the men carried away, and welcomed their return with a full supply of the staff of life. In this boisterous banquet, from her own baking she caused a manchet of bread to be placed at each seat, or sent the loaves of bread around in baskets to the feasters. To mark her high office she was denominated *ladie*—the breaker, dispenser, and, with slight assumption, the maker of bread. I have caused the legend "Bread Maker" to be engraved upon this piece of plate, and I trust the lady, Miss Clara A. Murphy, seventeen years of age, a resident of Brighton, county of Sacramento, into whose hands I now place it, will always retain and exhibit it as evidence of actual merit and honorable distinction.

Some time after the death of Judge Oscar L. Shafter, the Hon. Charles K. Field, an eminent lawyer of Vermont, died in that State. In a notice of Mr. Field by a Vermont journal, allusion was made to James McM. Shafter as "the last of that generation of men composed of the Bradleys, the Kelloggs, the Shafter and the Fields, who for more than half a century gave eminence to the bar of Windham county, and whose names will always shine in the galaxy of Vermont's distinguished men."

This coming to the eye of Mr. Shafter, in San Francisco, recalled to him a host of memories of the bar leaders of his native State, and exacted from him a fervent and affecting response:

"Though personally as far removed from Vermont as our national barriers will permit," he wrote to the journal referred to, "I cannot pass this notice—this echo from home—in silence. As to the dead of the generation of men you name, after making all allowance for the glamour which time and distance always lend, the grandeur of their living presence comes back to me with such force that I place them among the best of those whose memory Vermont should cherish, with pride for their ability and reverence for their virtues. When I left Vermont Mr. Field was but arrived at the zenith of his life. I do not doubt that he went forward from that time. It was my good fortune to be his intimate acquaintance. His nature at the core was gentle and genial. His wit and sarcasm on more than one occasion made me their object of attack; but always humorous and witty, and always for honest advice or wise reproof."

After brief allusions to Mr. Field's brother, Roswell M., and General Kellogg, Mr. Shafter pays tribute to a political foe:

"Among these men was one, not only in age, but in soundness of judgment, learning and versatility of talent, who was justly to be called the Nestor of our tribe—the Hon. William C. Bradley. In all my observation I have never met one who was in himself the embodiment of so much humor, wit, pathos, power of statement and true eloquence as Mr. Bradley. It is one of my few unsatisfactory recollections of Vermont, that the misfortune of deafness, and his political opinions deprived the State and nation of the full benefit of Mr. Bradley's extraordinary powers."

Next, with emotion deep and strong, tempered by manly sense and marked by philosophic reflection, he speaks of

"A dearer one,
Still, and a nearer one
Yet, than all others."

"Of my brother I cannot permit myself to speak—at least, not as his memory deserves. He was a scholar from his youth and a ripe and good one; not, perhaps possessed of the highest and keenest perception, he had the higher possession of a solidity of judgment and such extraordinary powers of abstraction, concentration and generalization, as are rarely exhibited in one person. After he had gone through his examination of a question, it was his habit to call me into his room, and go over his process and conclusion with me. Almost invariably, at least to my vision, the 'hay, wood and stubble of false doctrine,' had disappeared as in fire, and nothing but the imperishable monument of truth and justice remained.

"If my brother and myself have done any good in our day and generation (I may speak for both), we acknowledge that we are indebted to the parents God gave us, and to the schools and moral and social influences of our early home, which taught us to live honestly, soberly and industriously, and, if we could not ourselves become great, in the language of the Vermont constitution, to honor those only 'most noted for wisdom and virtue.' It has ever been our maxim that it was not necessary for us to hold office nor even to be happy, but it was necessary *to be right*.

"I have a deep abiding hope for the great future of California. I believe and hope its earth will finally cover me. But when that day comes (and you admonish me that I am the last of my generation), I know that my love for Vermont and the heart upon which it is written will fall into dust together."

In this connection may be appropriately quoted some words uttered by Mr. Shafter concerning his brother on another solemn occasion. He addressed the Supreme Court of California, in March, 1881, on presenting the memorial resolutions of the San Francisco Bar Association relative to the death of Hon. John W. Dwinelle. After dwelling upon the character and career of Mr. Dwinelle, and after referring to some others of those who had departed forever from prominent places at this bar, Mr. Shafter said:

"My brother, an ex-Justice of this court, smitten by disease, the result of loyal, inordinate labor in his profession, died in a foreign land. His prayer for death, if it was the will of God, rather than life with mental aberration, was not answered. The cup of bitterness was commended to his lips. Unhappy paradox! outliving the death of all that was himself."

The following, which appeared anonymously while Mr. Shafter was attending the Constitutional Convention of 1878, I have ascertained was from the pen of Rev. J. H. C. Bonte, then an Episcopal divine of Sacramento, now Secretary of the Board of Regents of the State University. It is a portrait taken of this eminent lawyer while he was making an argument in the Fawcett case before mentioned:

Shafter himself is a part of his argument, so that even the stenographer must fail. His effort, like that of Freeman's, was wholly ignored by the other side, and for the same reason—it was unassailable. Shafter was gentle with Edgerton's luckless attack on

a clause in the minority report. He was reluctant to hurt, and moderated his blow in consciousness of his strength. He demonstrated the legislative character of the convention. The convention is, as it were, a Senate; the electors are the Assembly. The convention originates the constitutional enactments—the electors by ballot, complete or veto the measure. The legislative analogy is complete, and the result the same. The convention is one house, the electors the other. He echoed the judgment of the world when he said that the great majority of lawyers are less competent than enlightened laymen to build a constitution. A constitution is especially a popular enactment, embodying the popular thought; it must, therefore, be expressed in a language understood by the people. The popular acceptance of the meaning of the words must interpret the intent. The object of all our enactments in this direction was to confine judges to their judicial duties. The land had been sufficiently cursed by judge-made law.

I am not giving his argument, but a few flashes. The action of Shafter's mind exacts marked attention. He packs his speech with solid shot, and he is rapid because he feels that there is no other way of delivering his enormous cargo. He is massive in person and in thought, and he walks through his adversaries' arguments as an elephant through a cane-brake. As I imagined, he drives his points after the manner of the piledriver. The course of his argument is like that of a glacier—it fills every nook, expands and contracts without breaking; it moves on, crushing and pulverizing everything in its way. An iron will, invulnerable courage, reckless independence, terrible calmness, intimidating reposefulness, preside over his reasoning. But he is also gracious, and comes down to common apprehension. He is versatile and affluent in thought. He utters sententious argument in brief parenthesis. He is a philosopher as well as a jurist. He is a humorist, but his humor is ponderous and elephantine—the gambols of the lamb in the person of the elephant. Therefore, his humor crushes. The sportive leaps of the elephant are as dangerous to man as his wrath. He is modest, but also aggressive; his satire and irony lacerate and enter joints. He is strong in his personal magnetism. Fortunately, he is genial and winsome, or men could not live with him. His simplicity covers him as with a garment of beauty. But the greatest element of his genius is his impressibility; the age he lives in and its past touch him on all sides. The ruling traits of his character are to be found in his practical wisdom—the art of combining and keeping things in their places—a sense of the mutual dependence of parts—the element of man that corresponds to the law of gravitation in nature. Shafter is not an orator in the old sense of the term—he is more—he is a seer. He is not only a jurist—he is more—he is a statesman.

It may be sandwiched in right here that Mr. Shafter is fond of music, and in 1861 was President of the Handel and Haydn Society, which, embracing several hundred members, used to treat the public to "The Creation," "The Messiah," and other oratorios. He took a deep interest in the success of that once flourishing association, and met with it regularly. As I was a member too, in that long ago, I am happy to notice, as he no doubt is, the revival of this Society under the admirable presidency of Hon. Joseph D. Redding.

Mr. Shafter married Miss Julia Hubbard at Montpelier, Vermont, October 28, 1845. After a happy union of over twenty-five years, she died in this State February 11, 1871. There are living three grown children of this marriage—Payne J., James C., and Julia R. Shafter. The wide and rich

domain owned by Mr. Shafter in Marin county was acquired by him in 1856. It comprises 25,000 acres. Upon it are 2,000 head of live stock, including a large number of the most valuable cows to be found in any country. He is now living in San Francisco, and practicing law in connection with C. H. Parker and F. H. Waterman, but visits his estate every week. His little municipality in Marin county is probably worth half a million of dollars. He has some other property. He is said to be an expert on the subject of fine points in stock—but the stock he believes in goes on legs. He owns no mining stock. His opinion of *stocks*—especially mining stocks—is not flattering. Here is his view of the subject, and, with these words from his mouth, I bid him good-by:

"I have no words of blame for those who choose to invest their money in the turn of a card, or what is, at best, the same thing—a turn in the stock market. I leave them to state the moral character of the act, but I ask them: Would it not be, on the whole, better to invest such ventures in starting some honest man in business for which he was fitted, or inaugurating some industry, which by giving employment to only a dozen girls shall save them from a shadow that follows like a doom? This class of fortunes excites hatred. The wretch who holds aloft a light to mislead the good ship freighted with wealth, and bearing in her bosom untold love, hopes and sympathies, that he may steal her cargo and strip her deck, is not worse than he who wilfully misleads by false signs the weak and despairing in the stock speculations of our day. Poverty, suicide and sedition follow them; but who ever saw any great industry undertaken by such wealth? Young men, remember that in heaven's chancery, one honest heart, and in political economy, one dollar earned by honest labor, are worth more than all these men and their wealth together."

CHAPTER XVII.

James A. Waymire and M. A. Wheaton, of San Francisco, and John K. Alexander, of Monterey—Waymire's Early Life in Oregon—On the "Stump" at Nineteen—His Military Record—Courage and Coolness in Encounter—On the Bench and at the Bar in San Francisco—Mr. Wheaton's Genius for Mechanics—A Leading Name in Patent Practice—The Great Patent Case of N. W. Spaulding vs. The American Saw Company—The Case of Levi Strauss & Co., vs. King & Co., in New York City—Judge Alexander's Popularity—A Gold Miner in Calaveras—In the Schools of Sacramento—District Attorney and Superior Judge—A Compliment from the Supreme Court.

James Andrew Waymire, Judge of the Superior Court, San Francisco, in 1882, was born forty years prior (December 9th), in Buchanan county, Missouri. His father, Stephen K. Waymire, was a carpenter and a farmer, owning 160 acres of land on the Missouri river, near a small village. In 1843 the village was laid out into the town of St. Joseph, which, by 1860, had attained a population of 8,000, and now has become a flourishing city. Stately buildings cover the old Waymire farm, making the land that was almost unsalable in 1842, worth now thousands of dollars per acre. Judge Waymire's paternal ancestors came from Germany, near Saxe-Weimar, about the year 1732, and settled in Pennsylvania. Subsequently a portion of them removed to North Carolina, and afterwards, in obedience to the law of emigration, drifted westward by way of Indiana and Ohio to Missouri. His mother, Mahala E. Gilmore, was of Irish origin. His maternal grandfather, James Gilmore, was a Virginian by birth, but became a pioneer of Kentucky and Missouri. On both sides there were representatives of the family in the wars of the Revolution and of 1812, and also in the Indian wars. In 1808 one branch of the Waymire family established a settlement near Dayton, Ohio, where their descendants still live, numbering several hundred.

In 1845 Stephen K. Waymire, moved by the restless, spirit of the Western pioneers, started overland to Oregon with his family in a company of which his brothers Frederick and John, with their families, were members. Oregon was then an almost unknown land, and there was not even an established wagon road connecting it with the inhabited portion of the States. After crossing the Missouri river, Stephen K. was thrown from his horse and died from injuries caused by the fall. His widow, with her boy, James, returned to her father, who resided in Buchanan county, Missouri. Frederick and John became successful as pioneer farmers and business men in Oregon. The former was an active member of several sessions of the legislature and of the

convention that framed the State constitution in 1857. He died in 1872. John built the first wharf at Portland, and became a merchant at Dallas, Polk County.

In 1852 James Gilmore, with his family, including the widow Waymire and her son James, emigrated overland to Oregon. The boy made himself useful on the plains by helping to drive the loose cattle, riding horseback most of the way. Though under ten years of age, he had learned to write well enough to keep an interesting diary of the overland journey. The immigrants formed a settlement near Roseburg, in what afterwards became Douglas county, Oregon. Schools and churches were established as necessary accompaniments of the colony. At these James was a constant attendant, particularly distinguished for his studious habits. His grandfather had an excellent library of standard books, including the histories of Rollins, Gibbon, Hume, "Marshall's Life of Washington," "Weem's Life of Marion," "Plutarch's Lives," "Franklin's Works," "Clarke's Commentaries," "Pilgrim's Progress," and volumes of essays, speeches, poetry, etc. These books were the constant delight of the boy student. Although there was plenty of work to do on the farm (fencing, plowing, chopping wood and caring for the live stock), and he was always ready to do his part, the long winter evenings afforded ample opportunity for reading. Lamps were an unknown luxury, and candles were an extravagance sparingly indulged. But pine knots were plentiful and to be had without cost. By their cheerful light, James would often read until urged to bed by some older members of the family. He read history with map and notebook at hand. At fourteen years of age he was quite clever as a writer of both prose and verse. At seventeen he had acquired a fair knowledge of mathematics and Latin with the rudiments of Greek, and had learned phonography. After reaching fourteen years of age he was unwilling any longer to be dependent upon his relatives for support, and began making his own way in the world. His first earnings were by chopping cordwood. At fifteen he was a full hand in the harvest field, in making rails and other farm work. The next year, having acquired a horse and saddle, he obtained employment during the summer at \$2.50 per day in driving cattle to Washington Territory. In 1860, before he was eighteen, he taught school at \$50 per month and "boarded round" with the scholars.

This being the first presidential election at which the people of Oregon were privileged to vote, and on account of the slavery excitement, great interest was felt. Young Waymire, though not old enough to vote, made speeches for Lincoln, having become a zealous Republican by his historical studies and from reading the Douglas-Lincoln speeches, lectures of Channing, the *Tribune*, the proceedings of Congress, etc. Most of his relatives were pro-slavery in their views. In September and October he assisted in reporting the proceedings of the Oregon Legislature for the *Oregonian* and

other newspapers. This was the session at which Colonel E. D. Baker was elected United States Senator after an exciting contest. The young reporter made the acquaintance of Baker and became a great admirer of his genius. It was at Colonel Baker's suggestion, that he resolved to study law, and upon the adjournment of the legislature he set about it by taking "Hoffman's Legal Studies" as a guide, intending to read the introductory works there recommended while preparing for and passing through college. For years it had been his ambition to graduate at Harvard, and as he had no rich relations to help him through, he resolved to earn the necessary funds.

The winter of 1860 was devoted to study, as usual, and early in the summer of 1861 he resumed schoolteaching. But the mutterings of civil war were soon heard. There was a very bitter feeling prevalent on the Pacific coast towards the "Lincoln Government." Influential politicians favored the establishment of a Pacific Republic in aid of the Southern Confederacy that had already been organized. It became necessary to create a strong public opinion in favor of the Union. For this purpose a great many mass meetings were held throughout the State, and at several of these Mr. Waymire was an earnest and acceptable speaker, deprecating war but declaring his readiness to bear his part. The firing on Sumter shocked the country, but it was hoped war would yet be avoided. Then came the disaster at Bull Run in July and the war feeling reached fever heat. All the available troops of the government were needed at once. Augur, Sheridan and other veteran officers with their commands were immediately withdrawn from service on the frontiers of Oregon, Washington and Idaho, and sent to the new field of operations. It was necessary to have volunteers to take their place, so as to prevent the organization of a separate government on the Pacific coast and to protect the frontiers from the Indians. A cavalry regiment was organized as soon as possible and within a few months was ready for service. Waymire might have obtained a commission, but knowing his ignorance of military matters he preferred to learn by experience. Adjourning his school, where he was earning a good salary, he invested part of the money intended for college expenses in a horse and equipments, and enlisted as a private soldier on his nineteenth birthday. His company, with two others, were sent on an expedition, during the year 1862, under command of Colonel R. F. Maury, to protect the frontiers and the overland immigration. They went east to Fort Hall, on the Snake river, and returned to winter at Fort Walla Walla. During the winter, Waymire, having procured the necessary books, kept up his studies. In February, 1863, he was promoted a Corporal. In March of the same year he was surprised by an order directing him to report for duty on recruiting service, and on April 23rd he was further surprised by receiving a commission as second lieutenant. Rejoining his command, he accompanied

an expedition by way of Lapwai, Salmon river and Boise to Fort Hall. At Brunneau river there had been some depredations committed by the Snake Indians upon the immigrants. Lieutenant Waymire was sent with twenty men and two Nez Perce scouts to pursue the savages and punish them. By rapid marches up the river, he surprised a camp of the Indians, located in a deep canyon. Opening fire upon them from adjacent rocks, he drove them into the river, and across it. Plunging into the swift stream four feet deep, his little command waded across, pursued the enemy up the opposite heights, killed a number of them, captured their horses, and, returning, destroyed their camp, which contained a large supply of ammunition. In this affair, the lieutenant became engaged in a personal fight at close quarters with three Indians, two of whom he had wounded, but not enough to disable them. They were firing at him with revolvers, when timely aid arrived, and ended the contest.

During the winter of 1863 Lieutenant Waymire's company (D, Captain Drake) was quartered at Fort Dalles. There were several other companies at the same garrison. Waymire was adjutant of the command. He became interested in the profession of arms, and added to his library a number of standard works on the art of war. He also continued his course of reading in law.

In February, 1864, General Alvord, commanding the department, issued an order directing Lieutenant Waymire, with twenty-five men of his company and ninety days supplies, to proceed to the south fork of the John Day's river and encamp at some point best calculated to enable him "to protect the whites against the incursions of the Indians." There had been many raids upon the frontier settlers of that vicinity, extending over a distance of 100 miles; and this young officer, but a little over twenty-one years of age, was expected to protect that long line of settlements in a mountainous country with twenty-five men! He was left to act upon his own judgment. He proceeded at once to the south fork of the John Day's river, where he established a camp designating it "Camp Lincoln." With twenty men of his detachment he hastened on to Canyon City (a mining town) twenty miles beyond, for the purpose of investigating the situation of affairs. There he learned that a band of savages had recently killed some miners in the vicinity and driven off a number of horses southward over the Blue Mountains. The winter quarters of the Indians were unknown, and the lieutenant saw at once that the only way to protect the settlers was to make an aggressive fight against them in their own country. Accordingly he prevailed upon the miners to raise a volunteer company to assist him in a pursuit of the Indians. A company of 54 men were organized with C. H. Miller (afterwards famous 'he poet "Joaquin" Miller) as captain. This force of 74 men followed the trail of the savages across the mountains. It was in March, and

the winter's snow was still deep on the ground. During the first 13 days there was a snowstorm every day. The men slept at night without tents, and on waking in the morning usually found several inches of snow on their blankets. The lieutenant fared the same as the men. The supplies were carried upon pack animals. The horses fed upon such dry grass or brush as they could get from under the snow. The command moved southward to Stein's Mountain near Harney Lake. Here the snow ceased and cold rains began to fall. Some of the men became sick with the measles. The march was rendered so severe by the weather and sickness that 22 of the miners returned home discouraged, leaving but 32 of their company in the field. With these and his own detachment of 20 the lieutenant pushed on beyond Stein's Mountain, and on April 6th suddenly came upon a village of the enemy situated near a mountain gorge. This was late in the afternoon. An attack was immediately made and the entire population fled to the mountains, leaving everything behind except their horses and their arms. At three o'clock next morning the lieutenant with his command was in hot pursuit of the savages. After a march of about 20 miles southward, he was confronted by a large force of them on foot and mounted, well armed and prepared for a fight. They numbered from 300 to 500. Then ensued one of the most stubbornly contested battles in the history of the frontiers. It lasted from eleven A. M. until nightfall. The Indians, by reason of their fresh horses, greatly superior numbers and intimate knowledge of the ground, had so much the advantage that it is wonderful they did not massacre the entire party of soldiers. By a series of skilful manœuvres, Lieutenant Waymire succeeded in inflicting severe punishment upon the enemy with a loss on his part of only five men and a few horses. More than this, however, he ascertained the home of the Indians, thus enabling the General commanding to plan successful campaigns for the future. For this service he was complimented in general orders, and some years afterwards (1872) received a letter from General Alvord, containing the following paragraph:

"I always remember you as the pioneer of Crook's expedition to southeastern Oregon. When General Steel left New York in 1865, I saw him off and urged him to make a winter campaign in that region. He did so and sent Crook to carry out the policy." [General Crook with an ample force of men in 1866-7 conquered a lasting peace with these Indians,]

Relative to this affair the Adjutant General of Oregon, in his report to the legislature, said:

"The report of Lieutenant Waymire, of Company D, First Oregon Cavalry, will be found very interesting, and his encounter with the Snake Indians near Harney Lake, was undoubtedly the hardest fought battle in which our troops participated, and evinces a courage and coolness on the part of the lieutenant and his brave followers worthy of notice. Should any future occasion call

him again into the battlefield, I have no doubt, judging from the past, he would rank high as a military leader."

Lieutenant Waymire returned to Camp Lincoln with his command, and reported the result of the raid to headquarters. An expedition was immediately fitted out, consisting of three companies under Colonel Drake, to operate against the Indians. Waymire's detachment joined this expedition, and he served as adjutant of the command. Being a summer campaign, the Indians were able to keep out of the way, and little permanent good was accomplished, though there were several skirmishes, in one of which Lieutenant Watson and five soldiers were killed.

In the autumn of 1864 a regiment of infantry was called for by the general government, to be raised in Oregon. At the request of Governor Gibbs, Lieutenant Waymire was assigned to duty to assist in organizing the regiment. After the fall of Atlanta and the successful march to the sea, it became evident that the war was so far ended that there was no longer any danger on the Pacific coast. Thereupon Lieutenant Waymire tendered his resignation and, at the request of the Governor, it was accepted by General McDowell.

The young soldier, turning away from arms, became private secretary to the Governor of Oregon and devoted all his spare time to the study of the law. For two years following he had several hours a day for study, with the advantage of attendance at the courts and the advice of leading members of the bar. He also had access to the Mercantile Library—an excellent collection of miscellaneous books—of which he was librarian part of the time. In his law studies he was greatly assisted by the advice of Judge Deady, of the U. S. District Court, and the discussions of a law club of which he was a member. He reported the proceedings at a special session of the legislature in 1865 for the *Oregonian*, the principal newspaper of the State. He also wrote for the press and delivered several lectures.

In February, 1867, he was tendered a commission as second lieutenant in the First United States Cavalry. Alaska had just been acquired and the army had been increased. It was a common opinion that in future it would be necessary to maintain a large regular army. Under such a policy promotion would be rapid. With these expectations Waymire accepted the commission and came to San Francisco to be examined. The board, of which General French was President and Major Hasbrouck a member, gave him a thorough examination, doubting his capacity on account of his youthful appearance. He had no difficulty, however, in answering their inquiries. General French subsequently told Governor Woods that the board were greatly surprised at the young man's knowledge of military matters. The new lieutenant was assigned to M Company, stationed at Camp Lyon, Idaho Territory. He joined it at once and was assigned to duty as Quartermaster and commissary of the post. General Crook was then in command of the

district of Owyhee. He was soon after assigned to the command of the department, and General Elliott, then lieutenant colonel of the First Cavalry, succeeded to the command of the district. The Indians were very troublesome, and the troops were actively engaged against them, but Lieutenant Waymire's duties kept him at the post. Under his management the expenses of the post were greatly reduced. In May, 1869, the company was ordered to Arizona and about the same time Waymire was promoted to first lieutenant. But Congress had begun to reduce the army, and seeing little prospect of attaining any considerable rank during an ordinary life time, and knowing that every year he remained in the army would make it more difficult to live outside of it, he resolved to take final leave of it and to enter upon the practice of the law. Accordingly, he tendered his resignation, and it was accepted in September, 1869. All together he had been in the military service about five years and a half.

Shortly after this he resumed his law studies at Salem, Oregon, and at the request of James Anthony, one of the proprietors of the old *Sacramento Union*, he spent the winter of 1869-70, reporting the proceedings of the Senate of California for that paper. In September, 1870, he was admitted to the bar by the Supreme Court of Oregon after the usual examination in open Court. In the same class with him were John B. Waldo, afterwards a Judge of the Supreme Court and Raleigh Stott, since Judge of the Circuit Court. He commenced practice at once in Salem.

During the summer of 1871 there was a call for a meeting of citizens to consider the propriety of levying a tax sufficient to maintain free schools for six months in the year. The principal tax-payers were opposed to the proposition, and a great deal of interest was felt in the matter. Mr. Waymire was among the advocates of the tax, and, after a struggle, the proposition prevailed. Subsequently he was invited to address a teachers' association, and he delivered a lecture in which he reviewed with great thoroughness and ability the question of the right of the government to provide for and regulate the education of the young. The paper, being printed and extensively circulated, attracted attention, and by the force of its arguments was of great service in forming a public opinion that soon caused the enactment of laws establishing a greatly improved system of education.

Again yielding to the call of the *Union* he reported the Senate proceedings at Sacramento during the session of 1871-2. This was the session at which the Codes were adopted, and the change afforded a good time for beginning law practice in this State. At these sessions he had formed the acquaintance of nearly all the public men of the State, and had made many warm friends, among whom were Senators Perkins, Irwin, (since Governor) Curtis, Farley (since United States Senator), and M. P. O'Connor. At the

close of each session a vote of thanks for faithful reports was passed, and at the close of the session of 1871--2, a resolution was adopted allowing the reporter \$420 (\$3.50 per diem) as compensation for his work. This he declined to accept, on the ground that being in the service of private individuals he had no right to receive pay from the State. In May, 1872, the judges of the California Supreme Court appointed him phonographic reporter of that tribunal. In this position he served for three years. During that time he heard and took notes of all the arguments made before the court. He analyzed every opinion and prepared reports of all the cases decided. These reports were first printed in the *Union*, and most of them—with additions or other improvements in some instances—were subsequently embodied in the volumes of Reports from Nos. 41 to 49.

In 1873 Mr. Waymire delivered the oration upon Memorial Day, at Sacramento. Taking for his subject, "Sentiment in Politics," he demonstrated in a most pleasing address the utility and the necessity of "giving a right direction to the sentiments of a people and opening proper springs of feeling in the heart."

This address was published in the *Union* June 1st. Following is an extract:

"It is a happy feature of our form of government that it affords an ample field for the exercise of all the faculties of man. Sentiment is not one of the materials out of which legal judgments are constructed; it cannot enter the temple of justice, for there the blind deity stands with the poised scales which nothing but reason can turn. But in the legislative halls, where the lawmakers consider the expediency as well as the justice of a measure; in the pulpit, where the sublime truths of Christianity are inculcated without restriction; in the free press, upon which the people depend so largely for information and counsel, and especially in the popular forum, where that great controlling power we call public opinion is concentrated and directed to some special purpose, sentiment, feeling, all the hidden springs by which men are moved to action, are called into play. We can all feel the fires of patriotism enkindled within us when we hear the inspiring strains of some grand national air, listen to the eloquence of "thoughts that breathe and words that burn," or recount the glorious achievements of a favorite hero; but not all of us can go with Aristotle, Plato, Locke, and Bacon into the mysteries of metaphysics, or explore with Newton, Humboldt, Herschel and Agassiz the wonders of nature; or follow and appreciate the profound reasoning of a Mansfield or a Marshall. Who in all the civilized world is not familiar with the names of Alexander, Cæsar, Cromwell, Washington and Napoleon; of Demosthenes, Cicero, Pitt and Webster; or of Homer, Virgil, Shakespeare and Schiller? How few comparatively, know anything of the patient men who have devoted their lives to the development and perfection of the arts and sciences to which every one of us is indebted for the comforts of daily life; or of their collaborators who have dedicated themselves to the cold logic of the law—that intricate fabric which permeates and sustains all society, and which everybody is presumed to know, but which, in fact, nobody does know. A learned Judge, who has been a score of years a student of legal lore, gives days, and weeks, and even months to the investigation of some knotty question of law affecting vital interests of the public; and at length his opinion, clear, compact, fit to stand as a precedent for all time is announced; but it attracts the attention of a small audience only, even in the community it most

concerns. A popular orator, in a political campaign or upon the floor of Congress or of Parliament, makes a ringing speech, mixing sentiment with his logic, and instantly his name is upon everybody's lips, and his words, borne upon the numberless wings of the press, become the rallying cry of hosts. He who wins universal fame deals not with the reason of men only, but with some common impulse as well—some feeling or aspiration of the human soul."

In the same address he urged conciliation toward those who were on the other side in the civil war, saying :

"They are now no longer a foe, but fellow citizens, friends, brothers ; and as once we stood up against each other, they clad in gray and we in blue, so now we are ready in response to the call of a common country—whether in the interest of the South or of the North—to stand together, shoulder to shoulder, under the broad folds of that dear old flag which was the flag of their fathers as well as ours—the price of commingled blood—and which we trust is to be the flag of our children and of their children to the remotest generations."

Mr. Waymire removed to San Francisco in July, 1874, and has been engaged in the practice of the law since May, 1875, when he resigned the office of reporter. His practice has been of a general character, embracing a wide range of important law points. In the preparation of his cases he is painstaking and industrious. Whenever the importance of the questions involved has justified the labor, he has made it a practice to write careful briefs and have them printed. He has been engaged in many important cases. In 1877 General Meyers, Consul General to Shanghai, China, employed him to prepare charges against Hon. George F. Seward, Minister to China. General Meyers had been suspended from office by Seward because he had reported certain irregularities in office on the part of the Minister. The evidence accumulated by Meyers was documentary in most part, and quite voluminous. This was analyzed by the attorney, and charges were prepared and printed. With this preparation and a brief by Mr. Waymire, General Meyers went on to Washington, where he employed Matt. Carpenter and Robert Ingersoll, to prosecute the case before Congress. After a long contest, Mr. Seward was recalled and the impeachment proceedings were abandoned.

To mention some of the cases, in which Judge Waymire has been engaged, that of Barton vs. Kelloch, involved the construction of the constitution as to the time of holding the elections ; in the People vs. Houghton the Supreme Court declared a Swamp Land act to be unconstitutional ; Mohrenhaut vs. Bell involved title to 26,000 acres of land in Sonoma county ; in the South Mountain Consolidated Mining Company he represented the creditors in an application for an assessment of \$300,000 on the stockholders ; in the People vs Parks, the Drainage act was declared unconstitutional and nearly a million of dollars was saved to the State ; In the San Francisco Gaslight Company vs. Dunn, the city's contract with the gas company was declared void ; the Pioneer Woolen Factory vs. Dunn, involved the validity of the Bayly ordinance.

The case of the People vs. Parks (58 Cal., 526) is one of the most important in the Reports. There had been a law passed by the legislature levying a tax of five cents on the \$100, for the purpose of building dams to stop the flow of debris from the mines worked by hydraulics. At a subsequent session the legislature, under the lead of Senators W. H. Sears, W. W. Camron and others, sought in vain to repeal this law, and there was great public excitement over the matter. Several ineffectual attempts were made to get the question of the constitutionality of the law before the Supreme Court. See Camron vs. Weil (57 Cal., 547) and Camron vs. Kenfield (57 Cal. 550). Those cases failed on questions of practice. Finally, the question was squarely presented in People vs. Parks, and the court decided the act was unconstitutional. The only point upon which a majority of the judges agreed was that the act in attempting to confer upon executive officers the power to form drainage districts involved a delegation of legislative functions and was, therefore, void. This point was raised by Mr. Waymire. The original argument on this point in the report of the case in the volume referred to, is well worth examination.

Judge Waymire went upon the bench of the Superior Court, by the appointment of Governor Perkins, October 17, 1881, to fill a vacancy. His appointment was greeted with the general approval of the bar.

His industry on the bench was generally remarked. The patience with which he would weigh masses of evidence, and the subtlety which he would bring to the examination of nice points of law, were very pleasing, especially to lawyers of large practice. In his fourteen months on the bench he rendered eleven hundred opinions, a large proportion being on demurrer, but all on questions which counsel had made the subject of argument. Of thirty appeals from his judgments only three appeals were sustained.

At the end of Judge Waymire's short term as Superior Judge, he was nominated by his party for re-election. The Republicans were divided in San Francisco at that time, on local issues, but he was presented for re-election by both factions and unanimously. He was defeated by a small majority, owing to a change in the German vote. In consequence of an agitation of the Sunday law question, that vote seemed to be cast almost solidly for the Democratic nominees, State and local, political and judicial, in 1882. It was in that campaign that Charles Kohler, the large producer of native wines, and President of the "League of Freedom," went over to the Democracy from the Republicans, with a large following. Mr. Kohler, however, desired to see Judge Waymire re-elected. The lawyers supported the Judge with general concurrence; Hall McAllister and other bar leaders publishing a card in his behalf. Although defeated, he received the highest vote of all the Republican candidates in that contest, and ran over 3,000 votes ahead of his party candidate for Governor.

Resuming his profession, he expected that the work of building up a business anew would be the engagement of years. But hardly a year had passed before his practice was so extensive that in comparison with it, his business before going on the bench was small.

The litigation which has since made his name most familiar to the public was that of the so-called railroad tax cases. He had been the attorney of Hon. John P. Dunn when the latter was Auditor of the City and County of San Francisco, in matters affecting the public, and was again called into counsel by Mr. Dunn, when he had passed from the Auditor's office in San Francisco to that of State Controller. One hundred cases had been instituted in thirty-three counties of the State, by the District Attorney, against the Central Pacific and Southern Pacific Railroad Companies. These suits were brought to recover sums of money claimed to be due as delinquent taxes, and the aggregate amount was over one million dollars. They were all, on motion of the defendants, transferred to the United States Circuit Court at San Francisco, for the reason that they involved questions arising under the federal constitution.

Controller Dunn employed Judge Waymire with others to assist the Attorney General in pressing these suits to judgment. The Railroad Companies had paid in a little over \$200,000, after the suits were begun. The State lost these suits, both in the Circuit Court and in the United States Supreme Court. However, the attorneys sued out writs of error to the Supreme Court of the United States, and before the decision of that tribunal, succeeded in collecting \$800,000 from the defendants.

In February, 1883, Judge Waymire was elected by the Encampment of the Grand Army of the Republic a member of the Veterans' Home Association of California for a term of five years. This institution has established and maintains a home for disabled ex-soldiers at Yountville. In March of the same year he was chosen a director of the association named, and served as chairman of the executive committee until March, 1885, when he was elected president of the association. He has been twice re-elected as president. It was his suggestion that the Federal Government was memorialized to establish a Branch of the National Soldiers' Home on the Pacific Coast. He was appointed to urge the enactment of the necessary law to that end. After several years of correspondence with members of the Board of Managers, and with Senators and Representatives in Congress, he had the satisfaction of seeing a law passed which appropriated \$150,000 to build the Branch Home. In November, 1887, a site was selected near Santa Monica, where buildings will soon be erected, with accommodations for 2,000 old soldiers. He was also a delegate to the National Encampment of the Grand Army, held at Portland, Maine, in June, 1885. In January, 1887, as President of the Veterans' Home Association of California, he issued in pamphlet a report of the

transaction of this association. It was addressed to the Governor of the State, because it was from the State that the institution derived most of its revenue; and it covered the transactions of the association from the beginning, as no report thereof had before been issued or prepared.

In the recently tried case of Shultz vs. McLean, before the Superior Court of San Luis Obispo County, Judge Waymire and Mr. T. C. Van Ness were associated for plaintiff. It was one of those cases in equity, so hard to win, in which the plaintiff seeks to have a deed given by him set aside, as having been obtained by fraud. The plaintiff prevailed in this suit, however, recovering title to 22,000 acres of land.

John McBrown, the well known farmer of Marin and Contra Costa Counties, now deceased, was one of the best clients of Judge Waymire, who now has in hand the settlement of the large estate left by that gentleman.

In addition to his professional successes, Judge Waymire has made some fortunate ventures in San Francisco real estate. His home, however is now in the town of Alameda, where he has a fine dwelling in the midst of four acres of land attractively improved. Upon this he has expended \$30,000. He has a wife, two sons and two daughters, having married at Lafayette, Oregon, on June 22, 1865, Miss Virginia Ann Chrisman, a Virginia lady, who, like her husband, is of German ancestry.

Our annals have now and then disclosed the pleasant example of a lawyer on the bench, so intrenched in the respect and confidence of the bar and people of his district, as to seem to hold his office by a tenure dependent solely upon his own will. Such an instance was presented in the late Robert C. Clark, of Sacramento; another, in the late Samuel B. McKee, of Alameda; and a living illustration is seen in the Superior Judge of Monterey.

John K. Alexander was born October 8, 1839, in Rankin county, Mississippi, of American parents. His paternal ancestors were Scotch, and on his mother's side they were English and German.

Brandon, a little town, was the county seat of Rankin county, and John K., was born there during the flush times of the "Brandon Bank" when money was plenty, although it was of the "rag" variety. The elder Alexander was then, as he continued to be for a long period, there and in California, a contractor and builder, and did a large business until the financial crisis, that followed the flush times aforesaid, threw him into a sea of troubles, and, not being able, by opposing, to end them, he removed with his family to Jackson, Mississippi. There he followed his trade for some eight years. In November, 1849, leaving his family, a wife, two sons and a daughter, at Jackson, he started for California, arriving in the following January, and settled at Sacramento. From the time he left his family until July, 1854, his

son John K. attended both public and private schools at Jackson. In that year the family circle was complete again, at Sacramento. There John K., very soon after his arrival, entered a public grammar school, which he attended until the fall of 1857. Then, his father being interested in a gold mine in Calaveras county, he was offered an opportunity to make his first money, and embraced it. He worked in the mine (the Woodhouse Quartz Company's claim) for about one year, laboring hard, to his great advantage physically. Returning to Sacramento, he brushed up his boyish scholarship, applied for admission to the High School, and, on examination, was admitted. He remained in that school for two years, serving one term as vice-principal. Then graduating, he commenced the study of law in the office of Geogre R. Moore, who was a good lawyer, with a large business. He studied later under Harrison & Estee. He took up the study of the law gravely, seriously, with a good conception of its perplexities and accumulations, conscious that it challenged the thoughtful investigation of the best quality of mind, and expressing, very quietly but with the conviction that he could accomplish it, his intention to succeed. He was admitted to practice in the Supreme Court, October 7, 1862, upon motion of Morris M. Estee and after examination in open court.

In 1863 he formed a partnership with his old instructor, Mr. Moore, which lasted until the latter's death. Mr. Moore, who had watched with interest his studious and painstaking qualities, had perfect confidence in his competence, and threw the burden of the business upon him. This was of immense service to him. He came to owe much to Mr. Moore, whose advice and prompting greatly aided and stimulated his labors while he studied, and which have continually advantaged him at the bar and on the bench.

After Mr. Moore's death, Mr. Alexander continued the practice alone, doing a good and paying business until the fall of 1868 when he formed a partnership with Hon. John W. Armstrong. This firm was dissolved upon Mr. Alexander's taking the office of District Attorney in 1870.

In the campaign of 1867, which resulted in the election of Henry H. Haight as Governor, Mr. Alexander was a conspicuous political figure at the capital, being chairman of the largest Democratic organization in that section. Two years later his party nominated him for District Attorney, and he was elected in a Republican county over his Republican opponent, M. C. Tilden, by 684 majority. He served one term, two years, with more than average success, and was then nominated by his party for County Judge. But he had to run against that popular veteran, Hon. Robert C. Clark, who held a continuous estate in that office until it was abolished by the constitution of 1879. He had also to stand up against the popular current on which Newton Booth was just then careering towards the chair of State.

Being defeated in that contest, before re-entering professional harness, he went with his family to the Eastern and Southern States, to revisit the friends and scenes of his boyhood, and generally to see the country and its wonders. Returning, after three months' absence, he formed a partnership with A. C. Freeman, who has since become widely known as a law writer and compiler. He materially assisted Mr. Freeman in the preparation of the work on "The Law of Judgments."

In August, 1874, he dissolved with Mr. Freeman and on account of ill health removed to Salinas City, the Monterey county seat, where he opened a law office. He had not been there long when the Board of Supervisors employed him in several important matters of public business. Among these was the case against Robert McKee, ex-county Treasurer, on his bond, and one against M. A. Castro, ex-Tax Collector, also on his bond; and in a criminal action against the latter, and W. H. Rumsey his deputy, which grew out of the burning of the courthouse. In these bond cases he recovered judgment and secured the money for the county. He was very successful in his new home, and, although often pressed to re-enter politics, he refused, and attended strictly to his law business. But, in 1879, being nominated by his party for Superior Judge, he could not resist the allurements of the highest judicial rank in the State under that of Supreme Judge. His pride was his profession, which was worth more to him, in a money sense, than the salary of Superior Judge. But he accepted the nomination tendered him, and was elected by 359 majority. He was re-elected in 1884, though the State and the County went for James G. Blaine for President.

His candidacy in 1879 was induced by a request in writing, signed by 100 of the leading citizens of Monterey County differing in politics, but all moved by a fear that the candidate of the Workingmen's Party would be Superior Judge. He was afterwards nominated by the Democratic Convention, and the nomination was endorsed by the Republicans. He was elected over two opponents, for besides the candidate of the Workingmen (N. G. Wyatt) the New Constitution Party, another ephemeral organization, presented a nominee in the person of an old bar leader of that region, Hon. D. S. Gregory, since Superior Judge of San Luis Obispo County. Judge Alexander's reply to the request of citizens in 1879 was as follows:

SALINAS CITY, July 9, 1879.

Messrs. James W. Finch and others. Gentlemen: I have the honor to acknowledge the receipt of your very complimentary letter, requesting me to become a candidate for superior judge of Monterey county. I am deeply sensible of the compliment you pay me, and my sense of obligation is intensified by the high character and standing of those whose names are appended to the request. I am also gratified to find that the list embraces the names of

citizens of all political parties. A judicial office is in its very nature non-partisan, and for that reason it has been the study of statesmen to divorce the selection of the judiciary from all political partisanship and elevate the administration of justice high above the plane of party strife.

To assume the judicial ermine and wear it worthily requires the abandonment of all party bias and personal prejudice, a possession of educational qualifications, "clean hands and a pure heart." While I do not claim for myself the full measure of fitness for the position of superior judge, and have grave doubts as to my qualifications for that responsible position, permit me to say that from the time I entered upon the study of the law, now more than fifteen years, it has been my ambition to worthily fill an honorable judicial position—an ambition which in the ethics of the profession has always been deemed laudable, because its possession affords in some manner a guaranty of a profound study of, and respect for, the science of government and administration of justice.

In view of these considerations, and with profound gratitude for the confidence expressed and the honor conferred by your request, I respectfully consent, and announce myself as a candidate for the office of superior judge; and if the partiality of my fellow-citizens should call me to fill that position, I shall bring to the discharge of its important duties at least an earnest desire and determination to perform them honorably, faithfully and impartially; and inasmuch as a new constitution has been ratified and will soon be the supreme law of the land, by the act of the sovereignty, it may not be improper for me to add that it ought not and should not be subverted by legislation, or nullified by hostile judicial interpretation, and if I am elected to the superior judgeship I shall take an oath to maintain and support the new organic law, and I shall do it; and when called upon I shall so construe and interpret it as to carry out the letter and spirit of its provisions.

Again expressing to you my sincere thanks, I subscribe myself,

Your obedient servant,

JOHN K. ALEXANDER.

Judge Alexander, while cautious, careful and methodical, is yet a man of dispatch. No case stands on his calendar more than three months. Practitioners in his court know nothing about "the law's delay" or the "insolence of office." He maintains the utmost order and decorum, and has had no trouble or unpleasantness with any attorney or litigant. Not one of his judgments has been reversed, although very many appeals have been taken from them. The first murder case tried before him, that of the People against Iams, is reported in 57 Cal., page 115. Therein the Supreme Court unanimously and highly complimented him. The official reporter, Mr. George H. Smith, sets forth Judge Alexander's charge to the jury in full. This is a

fine legal paper, and adds to the value of the Reports. The Supreme Court, in their opinion affirming the judgment of Judge Alexander, declare: "We are obliged to say, in justice to the learned Judge who presided at the trial, that the charge to the jury is a very clear and able statement of the law of homicide. It is a long charge, completely covering all the points in the case, and is, in our opinion, entirely correct."

Although arriving in this State at an early day, and for a time working in the mines, Judge Alexander never contracted any vice, but has always lived a pure life. His temperament is calm and judicial. While free from asceticism he does not frown upon reasonable conviviality and social cheer.

The Judge has long been a Mason. He is a Past Master of Salinas Lodge No. 204, and a member of Salinas Chapter, of Royal Arch Masons. He married at Petaluma, August 2, 1865, Miss Sallie B. Carothers, and has two sons, Elmer P., and Roy L. He is a member of the San Francisco Bar Association, whose rooms in the Supreme Court building he finds a most congenial place of retreat and conference in his frequent visits to the metropolis. He has a younger brother, Daniel E., practicing law at Sacramento, and one still younger, Frank A., a farmer. He lost at Sacramento, many years ago, soon after graduation and marriage, an only sister, one of the most interesting and amiable young women I have ever had the good fortune to meet. I may be permitted to recall her memory, and drop a tear to the long ago when I attended the school with her and her brothers.

The fiftieth anniversary of the marriage of Mr. and Mrs. B. F. Alexander, the venerable parents of Hon. John K. Alexander, was observed on the fifteenth of June, 1887. Mr. and Mrs. Alexander were married five days before Queen Victoria succeeded to the throne, and when Martin Van Buren was President of the United States, and came to California from Mississippi in January, 1850. Until recently they lived in Sacramento, where their son, the distinguished judge, was once District Attorney as stated. Their home is now on their farm, Laurel ranch, near Menlo Park, where the day and evening on the interesting occasion referred to, were given to the entertainment of their friends, very many of whom are among the leading lawyers and business men of San Francisco. Mr. B. F. Alexander is a retired contractor and builder.

The Del Monte Hotel at Monterey, after which the present structure of that name is modeled, was totally destroyed by fire on the first of April, 1887. This was a direct loss to the owner, The Pacific Improvement Company, of \$450,000, besides subjecting the company to many suits by guests to recover damages for the destruction of wardrobes and jewelry. The company soon came to believe that Edward T. M. Simmons had started the flames, in revenge for having been discharged from clerical employment in the hotel. It prosecuted him for arson. After a trial, the jury promptly acquitted him,

and he instituted suit against the company to recover \$100,000, for alleged damages to his character. His strong point was the promptness with which the jury had declared him not guilty. D. M. Delmas, who had with his usual cleverness defended him in the arson case, was his attorney in this suit for damages. Hall McAllister conducted the case for the company, which answered that it had "probable cause," etc. A verdict was rendered for the Company after a trial of fifteen days. On this interesting question of probable cause, it is well to preserve in this connection Judge Alexander's charge to the jury. The case was not appealed, and I take the more pleasure in laying before the profession this statement of law as it came from one who (in the case of Iams before mentioned) won such emphatic applause from the Supreme Court. Judge Alexander charged the jury in this case as follows:

In the present case the proposition of probable cause is involved and this is a matter of law, and is entirely with the Court, and I instruct you that if you believe that certain facts are established by the testimony, that then probable cause is shown. The Court tells you what is probable cause, as applied to various assumed facts, and you apply this rule to the facts which you find from the testimony produced. The single duty which the law casts upon you is to ascertain the facts, and the duty imposed upon the Court is to give you the law and also to define one of the special defences set up in this case.

It is charged that the defendant in this case wilfully, maliciously, and without probable cause, caused the arrest, imprisonment and prosecution of plaintiff. It is admitted that the defendant caused or procured the arrest, imprisonment and prosecution of the plaintiff, and your next inquiry will be, was there probable cause shown for the action of the defendant? The question is, was the charge made maliciously and without probable cause? In trials of this nature it is of infinite consequence to mark with the utmost precision the line to which the law will justify the defendant in going, and will punish him if he goes beyond it. On the one hand, public justice and public security require that offenders against the law should be brought to trial and to punishment, if their guilt be established. The interests of public justice require that parties who, in good faith, and upon grounds believed at the time to be sufficient, attempt to bring supposed offenders to just accountability, should not be mulcted in damages merely because the accused party had ultimately succeeded in obtaining an acquittal of the charge. Courts and juries and the law officers whose duty it is to conduct the prosecution of public offenses, must, in most instances, if not in all, proceed upon the information of individuals, and, if these actions are too much encouraged, if the informer acts upon his own responsibility, and is bound to make good his charge at all events, under the penalty of responding in damages to the accused, few will be found bold enough, at so great a risk, to endeavor to promote the public good. The informer can seldom have a full view of the whole ground and must expect to be frequently disappointed by evidence which the accused only can furnish. Even if he possessed the whole evidence, he may err in judgment, and in many instances the jury may acquit, when to his mind the proof of guilt may be complete.

On the other hand, the rights of individuals are not to be lightly sported with, and he who invades them must take care that he acts from pure motives and with reasonable prudence and caution. For the integrity of his own conduct, he is responsible, and his sincerity must be judged of by others from the circumstances under which he acted. If without probable cause, he has inculpated another and subjected him to

injury in his person, character or estate, it is fair to suspect the purity of his motives, and the jury are warranted in presuming malice. But, though malice may be proven, yet if the accusation appear to have been founded upon probable grounds of suspicion, sufficiently strong in themselves to warrant a reasonably prudent or cautious man in the belief that the person accused is guilty of the crime charged, he is excused by the law. Both must be established against him, that is, malice and the want of probable cause; of the former the jury are exclusively to judge and determine; the latter is a mixed question of law and fact. What circumstances are sufficient to prove probable cause, must be judged of and determined by the court; but to the jury it must be referred, whether the circumstances which amount to probable cause are proved by credible testimony or not.

What then, is the meaning of the term "probable cause?" We answer, a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a reasonable, cautious and prudent man in the belief that the accused is guilty of the offence with which he is charged.

I do not think that I can add anything to the exposition I have given, not only of the extent to which a citizen should be protected in making such charges as may lead to the enforcement of our penal laws, in cases where their infringement comes within his notice, and the extent to which they should be upheld by Courts and juries, when they act honestly and from pure motives, but also of the care and caution which they should exercise if they would find themselves justified in making such charges, should they prove unfounded. The rule, as I have already stated, is that the circumstances must be such as in themselves would induce a reasonable, cautious and prudent person to believe that the crime of which the party is accused has been in fact committed by him, and such as he might have known by reasonable inquiry. If the facts and circumstances known to him were such as to induce a reasonable, prudent and cautious man to believe and he did from these circumstances actually believe, that the crime charged had been in fact committed by the party, that is probable cause, and the party preferring the charge is excused by the law, even though the party accused may have been acquitted and proven to have been innocent. If it should turn out that the defendant in this case was entirely mistaken, that Mr. Simmons was innocent, that the witnesses by whom the defendant expected to prove the charge had deceived it, or that it mistook the bearing and weight of the circumstances upon which it relied; yet if defendant really believed such testimony, and it was of such character, that, laid before an ordinarily reasonable, cautious and prudent man, he would believe that the crime had been committed, the defendant could lay the charge before a magistrate, and should it turn out unfounded, be protected by the integrity of its purpose and the honesty of its motives. I will say here that no evidence is ever introduced before a jury as to what is the measure of a prudent, reasonable and cautious man. The ordinary measure of a prudent, reasonable and cautious man, you are yourselves to determine. As jurors, you are presumed to be reasonable, prudent and cautious men. You determine that for yourselves, as you understand the term, and then apply it as you interpret it.

If the defendant, for instance, had reason to believe and did believe, that the crime of arson had been committed by the plaintiff, from facts and circumstances that would have justified a reasonable, prudent and cautious man standing in its position in so believing; if it made and caused to be made such inquiry as a cautious and prudent man would make, and ascertained such facts and circumstances as would have induced a reasonable man to believe said crime had been committed by the plaintiff, that would have been probable cause for it, and it might act upon it with safety. If the acts of the

defendant in this respect can be justified on that ground, that is the end of this case and your verdict should be for the defendant.

If on the other hand, you find from the evidence that the defendant did not make such inquiry into the facts as a reasonable, prudent and cautious man would have made, and that, if it had made such inquiry, it would have discovered evidence which would have justified a reasonable man in believing that plaintiff was not guilty of the charge made, then I instruct you that the failure of defendant to make such inquiry, if it did so fail, shuts it off from resorting to that defense. The defendant cannot justify itself upon the ground of probable cause, unless it made such inquiry into the facts and circumstances as a reasonably prudent man would have made under the circumstances.

There is another proposition in the case, standing upon an independent footing, and which can be considered independently of any of the propositions discussed. That is that the party who made the complaint and caused the arrest, acted upon the advice of counsel. This, when satisfactorily proven, constitutes a special and complete defence, in actions of this character, and the advice of a lawyer of standing, honestly taken, upon a full statement of the case, may constitute a justification which would not otherwise exist. If a party having fully and fairly investigated a case, and possessed himself of its material facts, for the purpose of honestly taking a legal opinion upon it, and then fairly and honestly stating all of the facts and circumstances of which he is possessed, to a qualified and competent lawyer, for the purpose of ascertaining whether a crime had been committed, and whether a prosecution should be instituted, and the lawyer advises him upon these facts that they do establish a crime, and he believes and acts upon that advice, I instruct you that the advice of counsel thus given is a defence, and the defendant may justify himself upon it. It is sufficient for him to show that he stated the facts of the case which he had ascertained, as I have already suggested, by a fair and honest statement to the lawyer, as well the circumstances which tend to exonerate, as those which tend to convict, and that upon the whole case he was advised by the lawyer, that a prosecution should be instituted, and that upon that he acted, such advice of counsel, thus acted upon, constitutes a defence. If you believe that the defendant made and caused to be made the inquiry in question as to the facts connected with the alleged crime of the plaintiff—that it made all the inquiry which a prudent and reasonable person would make for the purpose of possessing himself of all the facts of the case, and represented them both pro and con in good faith to a competent attorney, for the purpose of taking a legal opinion, and by that attorney was honestly advised that a prosecution should be instituted and could be maintained, I instruct you that such a statement and action upon such advice, is a defense to this action, and that your verdict must be for the defendant. If you believe upon the other hand, that the defendant withheld or concealed testimony, or that the defendant, in investigating the facts of the case, did not make such research as a cautious and prudent man would make, but only possessed itself of such research and reports as would not of themselves be sufficient to induce this belief in a reasonable, cautious and prudent man, and placed such partial facts before the attorney and that the attorney acted upon them; that such facts were so meagre and imperfect as to deceive the attorney; I instruct you that such advice, procured upon such a statement, does not constitute a defense to this action, and the prosecution cannot be justified upon advice thus obtained. So much gentlemen, for the question of probable cause. I believe that is all that is necessary for me to say upon that branch of the case. If the defendant acted in good faith and upon proper inquiry as already defined in making its complaint, your verdict should be for the defendant.

Should you find that defendant, having possessed itself of the general facts of the case, to the extent which I have indicated, and placed them honestly before a competent

lawyer, (although it may have been mistaken and these facts might not have existed), if it stated the testimony from which it had reason to believe the facts would be established to its attorney, and was advised by him that it had good grounds to act as it did, and upon such advice so taken, acted, your verdict should be for the defendant.

To find for the plaintiff, you must find in his favor upon all of these propositions; you must find that the defendant did not have probable cause for making the complaint, and did not act under the advice of a competent attorney, honestly and fairly obtained; should you find for the defendant on any one of these propositions, your verdict will be for the defendant.

Should you find for the plaintiff upon the questions thus far considered, your next inquiry will be as to the measure of damages. And first, as to the question of malice as connected with the question of damages. In most cases that are brought for *torts*, the law, from the wrongful act, presumes the malice without reference to the spirit or purpose of the act. This is termed malice in law, and when established, is sufficient to entitle a person to recover his actual damages.

Besides this malice which the law implies from the wrongful act, without reference to the purpose of the wrongdoer, there is malice in fact, when the wrongful and unlawful act is committed for the purpose and with the intent to injure. In this case the law requires that the malice be proven. I instruct you that from the absence of probable cause you may find, as a matter of fact, malice or not. The law does not conclusively presume it, but, from the fact of the prosecution, where probable cause does not exist, the jury may find that there was malice. Malice, in fact, is always to be proved by testimony. It is not to be presumed. It is shown by testimony of the nature and character of the trespass complained of.

If the defendant manifests a hostile, malignant purpose, an intention to injure; if it shows a vicious, wrongful disposition, that it is not merely a mistake, to the extent of acting unjustly, but that it is done with a vicious heart, and for the purpose of injury, then you may assess punitive damages.

But, if you find that there was no probable cause, and find from the absence of probable cause, malice, then your verdict will be for the plaintiff, and the damages which you will assess will be compensatory for what injury plaintiff has sustained, for the actual sufferings he has undergone, and the actual loss which he has sustained from the wrong committed. That is the measure of damages, where no element of actual malice entered into the act complained of. But, if beyond this, you find that the acts were done with a wicked purpose, with an intention to injure, and that that was a principal or controlling purpose on the part of the defendant, in causing, without probable cause, the arrest, in such a case the law permits you to impose punitive or exemplary damages. The question of compensation does not enter into that, but you will impose them in the nature of a fine, as a warning to others, and a civil punishment to the party who has been guilty of such a wrong. But, before damages of this character can be given, a purpose to injure as well as a want of probable cause, must be established by the plaintiff. For malice in law, the damages are compensatory only. For malice in fact, you may add to compensatory damages such exemplary damages as may serve as a warning to other wrongdoers.

It was a genuine surprise to his brother lawyers who heard it, when the unassuming gentleman to whom I will now direct the reader's attention, testified on the witness stand on a certain occasion, "I have had more cases in the Supreme Court, and won more, than any other lawyer during my period at the bar."

It was not vainglory. His record was not known to those present. He was a much younger man than now, and his quiet way of commanding success had betrayed no concern for his fame. He was now on the witness stand as a lawyer, called to testify on the subject of a lawyer's charge for professional services, and the attorney whose cause his testimony damaged, thought to subject him to a severe ordeal.

It was in the course of a vigorous cross-examination that he was led to the utterance above quoted. Other lawyers there were who could point to more cases as theirs in our highest court, taking all the Reports together, but our lawyer witness expressly limited his statement to the period between his admission to the bar and the date of his testimony. We shall find it worth our while, pretty soon, to particularize and examine some of the many cases to which he made this general reference.

Milton A. Wheaton was born in Oneida county, New York, November 14, 1830. He is of an old American family. His father was a wagon maker, and had the reputation of being able to make anything in the way of mechanical construction. His genius in this line became the inheritance of the son, as has been repeatedly evidenced by the latter's masterful grasp of patent cases.

The son went to school in his native county and entered Hamilton College, which is there located, in the year 1851. He had maintained himself by working on farms since he was twelve years old. At fourteen, he made butter and three kinds of cheese, besides milking the cows. In winter he was always at school, and at all times he was eager for books, possessed by the idea of getting an education. He withdrew from Hamilton College, after less than two years of study there, to accompany an uncle to California. An older brother had come to this State in 1850. Some young friends had returned home after a year in the new gold mines, with purses of about \$2,000 each. Their good fortune and his uncle's invitation induced the student to leave his college, to which he never returned. He arrived in San Francisco by way of Panama on May 5th, 1853. He went at once into Butte county. The first work he did was chopping wood for a steam mill. Near the mill stood a dead forest of enormous sugar-pine. This he felled and cut up, at four dollars a cord. Out of the top of one of these pines he got twenty-one cords. In the next summer, (1854) he did teaming and freighting, and hauled lumber for Philip Cain & Co. In the summer of 1855, he commenced the study of law at

Sacramento, in the office of Carter & Hartley, and on the 15th of September, 1856, he was, after examination, admitted to the bar by the Supreme Court. In January, 1857, he began practice in Suisun, Solano county. For eight years he made his home there in the heart of a very fertile section of the State, where land titles were generally unsettled, and the practice was very remunerative to good lawyers. During this period Mr. Wheaton had a brief partnership with John Doughty, who afterwards left the law and became a clergyman of the Swedenborgian church. He is the same gentleman who has now for many years so worthily filled the pulpit of his church in San Francisco. Mr. Wheaton had no other partnership than this. In looking over his early successes at the bar we again see the fruit of patient struggle. He had no bad habits. He loved work and study. His cast of mind was practical and serious. And he kept faith. He acquired as great a reputation in the conduct of land cases, as he later won in San Francisco in the widely separated department of patent practice.

Mr. Wheaton's first appeal to the Supreme Court was in a case of his own. The suit was commenced in the then District Court of the Seventh District, on August 1st, 1859, and was determined in the Supreme Court, in October, 1861. Scott, Vantine & Co. and one Dimock were creditors of H. C. Brown, of Solano County, and the firm named brought an attachment suit against Brown. Eleven days after this suit was instituted, Dimock purchased Brown's property against which the attachment was directed, and in turn sold it to Mr. Wheaton, who was his attorney and also attorney for Brown in the attachment suit. All of these parties had personal knowledge of the issuance of the attachment. When Brown made the deed to Dimock, it was under advice of Mr. Wheaton, who, on the same day filed a demurrer for Brown in the attachment suit. He had examined the public records and found there was no judgment against Brown, and that no copy of the writ of attachment had been filed in the Recorder's office. Eighteen days later, on September 24th, Scott, Vantine & Co. had judgment against Brown and placed an execution in the hands of the sheriff, who levied on the property in question and advertised it for sale. Mr. Wheaton then commenced suit in the same Court to enjoin the sale as creating a cloud upon his title to the property. The District Court dismissed the complaint and he appealed.

In this his first appeal he had for his adversary John Currey, who was even then distinguished in the profession. Mr. Wheaton's point was that there had not been any valid attachment of the property. It is to be added here that after the deeds had passed from Brown to Dimock, and Dimock to Wheaton, the Sheriff filed a copy of the attachment in the Recorder's office. Mr. Wheaton urged that this was a void act, as the Sheriff had previously returned the original writ to the Clerk's office. John Currey, against this, contended that the attachment was levied in accordance with the statute;

that the filing of the copy of the writ with the Recorder after Brown's deed to Dimock, was effectual because, by the doctrine of relation, "where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred, and to this the other act shall have relation."

Judge Stephen J. Field delivered the opinion of the Supreme Court and Judge Joseph G. Baldwin concurred. It was decided that the filing of the copy of the writ with the Recorder, after the original had been returned to the Clerk's office, was ineffectual for any purpose. Nor was the deed from Brown intended to defraud Scott, Vantine & Co., as he made it in payment of his debt to Dimock. The Supreme Court reversed the judgment of the District Court, and directed that court to enter a decree for Mr. Wheaton in accordance with the prayer of his complaint. The property involved was worth \$5,000. (*Wheaton vs. Neville et al.*, 19 Cal. 42).

The case of *Hidden vs. Jordan*, 21 Cal. 93, is a leading authority on trusts. In November, 1857, the plaintiff was in possession of a tract of land in Solano County. The title was claimed by others and a litigation between all the parties was settled by plaintiff's admitting the opposing title and agreeing to purchase it. The deed of this title was executed to the defendant Jordan, who paid \$6,000 in cash and his note for \$1,780, payable in August, 1858, with interest at one per cent and secured by mortgage on the premises. The plaintiff continued to occupy and cultivate the farm. Of the \$6,000 cash paid by defendant, the plaintiff contributed \$2,000; and he, plaintiff, thereafter turned over to the defendant the entire rents and profits of the land during the years 1858, 1859 and 1860, and from time to time also passed to defendant the plaintiff's promissory notes, as the interest accrued on the \$4,000 cash contributed by defendant. The plaintiff took up some of these notes.

In November, 1858, plaintiff sued the defendant in the District Court, complaining, after setting forth the foregoing facts, that the defendant claimed to be the owner of the land in his own right by virtue of his deed. The plaintiff alleged that when the deed was executed, there was a parol agreement between plaintiff and defendant that the former should repay to the latter, within two years, all the money the defendant had contributed to the purchase, with interest, and also pay the note which defendant had executed for the balance due; and that upon such repayment in full, Jordan was to deed the land to plaintiff; and that the note executed by defendant had already been paid from the proceeds of the crops of the land. The plaintiff further averred that he had tendered to defendant the full amount of money advanced by him, with interest as agreed upon, and defendant had refused to receive it; and he prayed that he be allowed to pay the money into court and that defendant be decreed to execute to him a deed of the land.

The defendant answered, denying all the material allegations.

The judgment of the District Court was, that defendant deed to plaintiff an undivided one-third of the property, and account to him for one-third of the rents and profits, less one-third of the amount of the note executed by defendant and since paid; that all the notes between the parties be given up and cancelled, and that defendant repay to plaintiff the \$75 paid by the latter as interest.

Both parties moved for a new trial which was denied, and plaintiff appealed from the judgment and from the order refusing a new trial. Mr. Wheaton was counsel for the appellant, and Joseph W. Winans for the respondent. Judge W. W. Cope delivered the opinion of the Supreme Court, Chief Justice Field, and Justice Norton concurring. It was held that the appellant was entitled to the whole of the land. The parties had made an agreement, and the fact that this agreement related to a matter of trust and confidence, coupled with the fact that plaintiff had paid part of the purchase price, was undoubtedly sufficient, said the court, to avoid the Statute of Frauds. "What the defendant undertook to do was to purchase the land; not a part of it, but the whole; not for himself, but for the plaintiff; and what he is attempting to do is to deprive the plaintiff of the benefit of the purchase. This, according to the decision in *Bartlett vs. Pickersgill* (2 Eden 515), he might succeed in doing if the whole of the purchase money had been paid by himself; but, as the plaintiff paid a portion of it, he, plaintiff, is entitled to have the agreement enforced. * * * The plaintiff cannot be required to take less than the whole, for that was his bargain; and to allow the defendant to force him into the position of a joint purchaser, would be to sanction and legalize a fraud."

The next sixteen volumes of the Reports abound with Mr. Wheaton's cases. He made the appeal in *Ellis vs. Jeans*, his old antagonist before named, John Currey, having been associated with him in the trial of this case in the District Court. When it reached the Supreme Court in October, 1864, (and this was the third time it appeared there), John Currey was one of seven able men who composed that reorganized tribunal, and Mr. Wheaton made the argument for the appellants. In the decision, of course Judge Currey did not participate.

The action had been commenced away back in February, 1856. It was ejectment, 500 acres in Solano. There were several defendants. The plaintiff claimed under the title of Vaca, whose name is kept green by one of the Solano villages. The defendants derived title from the same source, excepting one of them (Jeans, whose name is fastened to the case), who exhibited no title. The title of the defendants was older than that of the plaintiff, the first deed in their deraignment having been executed by Vaca in 1849, while the first deed in the plaintiff's chain had been given by the accommodating Vaca in 1850. But this deed of 1850 was recorded in 1850, while the deed of 1849 was not recorded until 1856.

The judgment of the lower court was in favor of the plaintiffs and against all the defendants jointly. On appeal Mr. Wheaton urged that the judgment was erroneous because it was a fact admitted that the plaintiff himself was in full possession of one hundred and eighty acres of the land at the time of the judgment and for years before, while the Court assessed the plaintiff's damages through the whole interval and on the whole area. The Supreme Court sustained this objection of Mr. Wheaton's. The Court, speaking through Justice Shafter, said, "This finding upon the subject of damages was undoubtedly erroneous, both in fact and in law. It is true that the defendants, in their answers, deny the plaintiff's title to the whole or any part of the five hundred acres; but it is also true that the plaintiff could not recover damages for the use of land, of which the defendants had never dispossessed him."

P. W. S. Rayle, of Napa, counsel for the plaintiff, upon this, offered to file a release of all damages, and asked that the judgment of the District Court be permitted to stand, with damages released. Mr. Wheaton objected. He said the judgment had been reversed, not only for excessive damages, but for the further reason that the judgment had found that the defendants had dispossessed the plaintiff of the whole of the 500 acres, contrary to the admitted fact that he was in possession of 180 acres thereof. Mr. Rayle now offered to release the 180 acres from the operation of the judgment. Mr. Wheaton objected again, that there was nothing before the Supreme Court to show the location of the 180 acres occupied by the plaintiff. Mr. Rayle asked that the evidence in the trial below be looked into, and suggested that a survey be ordered to ascertain the lines, but the Court said that to grant this would be to exercise original rather than appellate jurisdiction. A new trial being ordered, this tedious case was tried twice more in the lower Court. Each time the jury disagreed. It was then compromised.

Mr. Wheaton removed to San Francisco in the year 1865. Just afterward the Supreme Court passed on an appeal which he had taken some time before leaving Solano county. It was the case of Long vs. Neville, and the appellate court, in its opinion, written by Chief Justice Sanderson, stated very clearly, and I believe for the first time, the class of cases in which notice of *lis pendens* must be filed. The plaintiff sued two men named Hull in ejectment. They made default and he obtained judgment against them for the possession of the land, and placed a writ of *habere facias possessionem* in the hands of the sheriff. But the sheriff refused to execute this writ because the parties sued were not then in possession, although another, one Brown, had come into the occupancy of the land, and held it adversely to plaintiff. The interesting fact was, that before plaintiff, in the ejectment suit, had recovered judgment, R. B. Ellis, who also claimed the land, had dispossessed the same defendants, by the hands of the same sheriff, in a suit under the act concerning

forcible entry and unlawful detainer. The sheriff, on receiving the second writ (in ejectment) refused, as stated, to execute it against the new comer, Brown. The plaintiff, by Mr. Wheaton, sued the sheriff for damages. Losing his case in the District Court, he appealed. The Supreme Court at first affirmed the judgment; sustaining the sheriff on the ground that no notice of *lis pendens* was filed in the ejectment suit. But Mr. Wheaton urged a rehearing, taking the position (against the opinion filed by the Court), that notice of *lis pendens* is not requisite or proper in ejectment suits, but that such notice is essential only in actions affecting land titles. He argued that judgment in an action of ejectment did not operate to transfer or establish title, but possession only; that the title remained precisely where it was before. In this view he prevailed, the Supreme Court granting a rehearing, and reversing the judgment of the Court below. (*Long vs. Neville*, 29 Cal. 132).

In the case of *Cannon vs. Stockman* (36 Cal. 535), another of Mr. Wheaton's appeals, the District Court instructed the jury that, the action being to recover land, and the defendant pleading the statute of limitations, it was necessary for the defendant to show that he had been in the continued exclusive possession for five years *next preceding* the commencement of the suit. Mr. Wheaton pointed this out as error, and the appellate court very positively sustained his objection. He had also asked the lower court to instruct that "A party in possession of premises, claiming to own the same, may buy his peace by purchasing any outstanding title, or claim of title, without admitting such title or claim of title to be valid." This instruction the court refused to give, and on appeal, the refusal was pronounced to be "clearly error." "The instruction asked, states the law correctly," observed the Supreme Court, by Chief Justice Lorenzo Sawyer, "and it should have been given in this case, for it was particularly applicable." It was decided in this case, that "when a party has been in the adverse possession for five years, he thereby acquires a title," fee simple, "and if after he has thus become vested with a right, he is ousted, even by the party holding the paper title, he can recover on his title acquired by his adverse possession at any time within five years after such ouster." The late Judge T. M. Swan was associated with Mr. Wheaton in this case, but only in name. Mr. Wheaton did the work and pressed the successful appeal alone.

It was in the year 1868, three years after his removal to San Francisco, that Mr. Wheaton began his active and long career in what has since been his chief line of practice. I refer of course to his acknowledged leadership in patent cases. His connection with the great suit of *N. W. Spaulding & Co. vs. Tucker & Putman*, agents of the American Saw Company, was an example of that "tide in the affairs of men, which, taken at the flood, leads on to fortune."

Nathan W. Spaulding, Assistant United States Treasurer at San Francisco from May 5th, 1881, to August 20th, 1885, came to California in the year 1851, from Maine, where he was born September 24th, 1829. At a comparatively early date in his long career, remarkable for achievements in business and invention, he made the discovery, of which the litigation now to be noticed was a product. It was at Sacramento in 1859, where he had a shop for the repair and sale of saws. The discovery was an improved method for fixing teeth in circular saws. Inserted tooth saws had been known for many years to possess great advantages over solid tooth saws. Teeth made separate from the saw plate could be tempered better and formed into better shape for fast and easy cutters than when made out of and being a part of the saw plate itself, and could be replaced when damaged. But these and other advantages of inserted tooth saws could not be made available, on account of the tendency of the saw plate to crack from the corners of the sockets in which the teeth were inserted. These sockets had always had square corners. Mr. Spaulding by experiment found that a blow from a sledge would not crack the saw plate, but that the fracture occurred while the saw was in motion, subjected to the various strains, called by experts the side strain, the twisting strain and the splitting strain. He found by careful investigation that the strain and constant vibration incident upon the use of the saw, caused crystalization of the metal at this point, and with a powerful glass minute crystals and fractures could at first be observed which soon developed into cracks that before long ruined the saw plate. No such defects proceeded from any other part of the socket. The happy thought occurred to the inventive mind in search of ways and means to accomplish ends, that if the point of difficulty was in all cases at the angle of the socket what would be the result if there were no angles? Numerous practical tests were made to demonstrate the truth of the idea, and the problem was solved. He simply made the corners of the socket round, or as Mr. Wheaton expressed it in one of his briefs, he used circular lines in forming the junction of the base and sides of the sockets, or, as the letters patent afterwards stated, he used circular lines for the sockets at the base or other places therein where the pressure or force applies. A beautiful effect was secured, a great result was accomplished, no less than a perfect protection against the cracking of the saw plate. A revolution was wrought in the manufacture of lumber. At the trial of Spaulding's patent cases many of our largest and most practical millmen testified to the great improvement made by Mr. Spaulding which in some instances increased the output of their mills twenty-five per cent. When we consider the colossal proportions of the industry and capital affected we may form some conception of the value of this discovery.

Mr. Spaulding's application to the Government for a patent was at first rejected, as I find on reading the brief of counsel referred to, which is a very

interesting and comprehensive paper. The nature of the invention was not grasped. But when proof was introduced to them showing the great effect produced by the use of circular lines in a saw socket, they looked deeper. A discovery of incalculable value was apparent. The letters patent applied for were issued. A flow of gold came in to the inventor from appreciative mill owners. The American Saw Company, having its headquarters at New York City, sent to the Pacific Coast a large lot of saws equipped according to the new method and proceeded to undersell the patentee in this market. Mr. Spaulding, as soon as he could, put a stop to this, by injunction suit. Other infringements followed by William Tucker and S. O. Putnam, and others. Mr. Spaulding sued these parties in their individual capacity, but always declared that they were the agents of the American Saw Company, and that that company made their fight in this great suit.

There never has been in our courts a series of law suits more persistently or bitterly contested; unlimited capital and talent and every thing that either could control to break down Spaulding's patent were arrayed on one side, while the other was nerved by the consciousness of right, and a bulldog determination to sustain a principle, on the part of both client and counsel.

It is reported that over \$70,000 was expended by the parties thereto in these contests. Over two hundred witnesses were examined in one of these suits; these witnesses were brought to court from all over the United States and some from Canada. The mountains of all New England were rummaged, the rivers dredged, old wells cleaned out, and obscure memories were dug up and made to do duty for the defence. Saw teeth were altered to conform to the desired shape, and everything else was done that craft could do to defeat the Spaulding patent, regardless of expense.

It is a curious fact that Mr. Spaulding had been turned away by several of the most eminent of our lawyers, to whom he had successively applied to take his case, before a friend directed him to Mr. Wheaton. The latter, it has already been perceived, was not known as a patent lawyer; indeed, he had as yet no practice in that line, and his name had not been seen in the Patent Office at Washington. But it was known to some who had met him on other fields of trial, that he was not only a sound and safe lawyer, but possessed genius in mechanical construction. So, when the perplexed inventor was telling to Abner Doble one day, the difficulty he had in obtaining a competent lawyer, "Go to Wheaton," said Mr. Doble; "he knows something about patents. And he is a mechanic, and a good lawyer." The inventor found that this was true. He had not met Mr. Wheaton before, but his visit to him on that occasion was the beginning of a protracted connection as lawyer and client, and of a personal friendship which has been close and unbroken.

In this suit against the emissaries of the American Saw Company, Mr. Wheaton had Hall McAllister for his adversary. George Gifford, of New York City, since deceased, but then probably holding the first place at the American Bar in patent cases, was also employed for the defense, and devoted himself to the examination of witnesses before masters in chancery in eastern cities. In this way was the evidence taken, the suit being in equity in the United States Circuit Court at San Francisco. The question was, Had there been a public use of Mr. Spaulding's discovery before? In gathering evidence and attending examinations in the East, Mr. Wheaton expended \$5,000 of his client's money in a period of six weeks. As will be granted, it was an arduous and costly controversy. In the cloud of witnesses for the defense was R. M. Hoe, patentee of the Hoe printing press. He testified that R. M. Hoe & Co. had made use of the same thing on which Mr. Spaulding had received letters patent, in the year 1837. This and all like evidence was really destroyed by Mr. Wheaton's cross-examination. When the evidence was all in and reviewed he was enabled to argue logically that rounding the junction of the base and sides of the sockets was an original conception of his client's, and was a very great and valuable improvement upon the saw, and patentable. It came within that class of improvements which are called combinations, the form being one of the elements of the combination. He argued his side of the case alone, and showed that where form is employed to produce a new effect, it is as much a subject of a patent as any other device.

I will offer in evidence here this extract from his exhaustive brief:

"We are saying, perhaps, more than we ought to, upon the question of the patentability of the plaintiff's improvement. That he has made a very great improvement upon saws is undisputed. If he was the first inventor or discoverer of that improvement, then his patent is valid, and meets the full requirements of the law, however experts, skill and ingenuity may try to confound that improvement with other things of older date. The mechanical inventor's skill is mechanical skill, and nothing else, and in law all abstract principles are considered old, and every real invention (which does not include accidental patentable discoveries) is made up of old principles, old materials, and mechanical skill, and generally is only new combinations of old devices. The farthest limit of invention only includes the taking of materials furnished by nature and working them into such combination and shape that by them we can grasp principles and agents in nature, and render them subservient to the uses of man. The inventor does nothing but put into new forms and use old principles and old materials. He creates nothing. He uses nothing but materials and mechanical ingenuity, which is only another name for the higher order of mechanical skill."

Hall McAllister presented a full and learned brief in reply. He fought this case with all that "Satanic industry" which Gen. W. H. L. Barnes once referred to him as possessing. (Argument in Jessup Will Case, before Superior Court, Judge Coffey, at San Francisco, 1888.) In his brief in this battle of the saws, Mr. McAllister introduced Satan, by the way. He undertook to be very severe on the patentee personally, but it is noticeable that one of his

headings, in italics, reads: "Spaulding's indefatigable assiduity in his applications for a patent illustrates the tenacity of his character." Mr. Spaulding has been heard to say that he considered this a large compliment from a great legal light. And this counsel's personal thrusts are relieved by the humor that is wont to parallel his reason—as this:

"We claim *form* is of the essence of this invention, and plaintiff should be confined to his particular form. If he is not to be controlled by his diagrams, then every possible form of teeth for saws inserted on circular lines is embraced by this patent.

A quarter circle; a semi-circular tooth; an entire circular base; an oval-shaped tooth; segments of circles; all are embraced. It is an elastic patent, a bed of Procrustes which will fit everything. It is indefinite shape on circular lines; it is a circular, or semi-circular, or partially circular, configuration. It is a conformation with round corners. It is an indescribable circumference, or fraction of a circumference. It is a curve, or roundlet, or cycloid, or zone, multiform and heterogeneous. If we may compare small things with great, it is well described by Milton in his account of that shape which Satan encountered as he explored his solitary flight towards the thrice three-fold gates of Hell:

The other shape,
If shape it might be called, that shape had none
Distinguishable in member, joint or limb."

The result of this suit was a judgment for Mr. Spaulding, fully sustaining his patent. In a recent conversation with Mr. N. W. Spaulding, of which Mr. Wheaton was the subject, the great inventor bore strong testimony to the high character of his counsel and to the latter's genius for the line of law business in which he has become so celebrated. Mr. Spaulding is not given to exaggeration, far from it, but has a most discriminating mind and is judicious in statement. His encomiums were pleasant to the ear, and I remarked to him that his was strong praise indeed, coming from one who knew well whereof he spoke. "Why shouldn't I speak well of him," he replied. "He is both lawyer and mechanic. He has great inventive genius. He understands his business and tries his cases admirably. He argues with power and his briefs are very fine. You have seen a fine buggy horse that would'nt pull well when harnessed with another. Wheaton has a peculiar way of getting at the core of a thing, and he must have his way in trying a case. After he had won all my cases, I went to him and asked him how much I owed him. He said, 'You don't owe me anything!' He recognized that in conducting my business to a successful issue he had thoroughly equipped himself as a lawyer in patent cases, and that his fame and fortune were assured. Of course I had paid him considerable money during the progress of our litigation, but I expected to pay him a great deal more."

Mr. Gifford, the leading patent lawyer of the East, before named, and opposed to Mr. Wheaton in this litigation, afterward sent the latter a handsome retainer in another patent case, which, however, was never tried. Indeed, Mr. Wheaton's fame in this line of cases very soon became as wide as the continent. He is called to other States frequently to try some

important patent case, and in the course of his practice he has argued quite a number of causes before the United States Supreme Court. At present he has cases pending in Boston, Chicago, and St. Louis. I cannot omit special mention of the case of Strauss vs. King & Co. Mr. Wheaton won this case for Levi Strauss & Co., in the United States Circuit Court for New York, before Judge Blatchford, now of the United States Supreme Court. The litigation was over a patent on an invention used in riveted goods, principally in heavy duck overalls worn by hunters. J. W. Davis, a tailor, a resident of the State of Nevada, invented this contrivance and obtained letters patent. He assigned his patent to Levi Strauss & Co., of San Francisco. Their suit against King & Co., who were merchants of New York, was, of course, to put a stop to infringement by the latter. The witnesses examined in this case numbered 400, and there were over 3600 pages of printed testimony, besides a large number of exhibits.

Mr. Wheaton was united in marriage with Miss Carrie C. Webster, at Suisun, December 24, 1862. She died in July, 1873. On September 24, 1876, Mr. Wheaton married Miss Dora Perine, also of Suisun. This lady lives and they have two daughters. A son by the first wife is now a young man. A comfortable home on the California street hill, has been the family dwelling since the year 1876. Mr. Wheaton has a moderate fortune. His law offices are spacious and elegantly furnished, his library being one of the largest and most select.

CHAPTER XVIII.

S. C. Hastings, First Chief Justice of the Supreme Court—Founder of Our Only College of Law—His Early Career in Older States—Chief Justice of Iowa, and Member of Congress—A California Pioneer—Attorney-General in 1851—His Judicial Opinions—Beginning of His Great Wealth—A Philosopher With a Midas Touch—Perennial Humor—A Practical Joke on James B. Haggin and Lloyd Tevis—How the Latter Got His Start—Interesting Facts About Haggin and Tevis—A Story on Hastings By the Elder Baldwin—Original and Amusing Views Touching Our Last War—References to William H. Seward, Jefferson Davis, Lewis Sanders, Jr., William M. Lent, Dr. J. D. Whitney and others.

A generation has passed away since, from the bench, Judge Hastings spoke the oracles of the law; and there are few of our oldtime lawyers who will be able to recall his last appearance in court. But the high stations to which he attained, the distinguished relations which he once bore to the profession in two States, the large place which he continues to fill in the business world, and his munificent gift to this commonwealth of its only college of law, which will make his name familiar to remote posterity, entitle him to a prominent chapter in this volume.

Judge Hastings was born in Jefferson county, New York, November 22, 1814. His father, Robert C. Hastings, removed in early life from Boston, his native city, to Rhode Island, thence to central New York. He there married Miss Patience Brayton, whose family had been among the earliest settlers of that region. There were seven children of this marriage, all of whom attained majority.

The elder Hastings died on a farm near Geneva, New York, when his son was ten years old. The family then removed to St. Lawrence county. There this son attended the Gouverneur Academy for six years, being under the special instruction of two tutors—graduates from Hamilton College. At the age of twenty, he was tendered and accepted the position of principal of Norwich Academy, in Chenango county, New York. This institution had gone into a sort of decline, but was inspired with new life under the administration of its young principal, who introduced the Hamiltonian system of instruction and the Angletean system of mathematics, and other branches of education. At the end of one year he resigned and went to Lawrenceburg, Indiana. There he pursued the study of law, first in the office of Daniel S. Mayor, afterwards in that of Hon. Amos Lane. He had, before removing from Norwich, read law for a few months in the office of Charles Thorpe,

Esq., of that town. In the exciting Presidential campaign of 1836, he was editor of the *Indiana Signal*, and in that capacity gave a cordial support to Martin Van Buren. In December, 1836, he was admitted to the bar by the Circuit Court, at Terre Haute, Indiana, Judge Porter presiding.

In January, 1837, he removed to Burlington, in what is now the State of Iowa, then known as the Black Hawk Purchase. He soon located at a little hamlet, which has grown into the city of Muscatine. All that vast region was then under the jurisdiction of the courts of the Territory of Wisconsin. Having, after another examination, been again admitted to the bar, Mr. Hastings commenced practice. He was soon appointed a Justice of the Peace by Governor Dodge, of Wisconsin Territory. He used to say that his jurisdiction covered the whole western territory, extending even to the Pacific ocean. He was a man of large stature, capable of great physical endurance, shrewd, energetic, alert in mind and body, simple in his tastes and habits, peculiarly adapted to the border, and was not to be found wanting in the ebb and flow of frontier life. When Iowa was admitted as a State, he was, probably, the best known and most popular of her citizens.

As Justice of the Peace, he had but one case to try during his term. It was a criminal charge. He found the accused guilty of stealing \$30 from a citizen, and \$3 from the court, and sentenced him to be taken by the constable, to a grove near by, to be there tied to a tree, and to receive on his back thirty-three lashes—thirty for the theft from the citizen, and three for that from the court—then to be transported across the river to the Illinois shore, and banished from Iowa forever. The sentence was executed under the eye of the court, in the presence of a large crowd of people.

When the Territory of Iowa was created in 1838, Mr. Hastings was elected, as a Democrat, a member of the lower branch of the legislature. He continued to represent his county, in either the House or Council, at every session of the legislature until the admission of Iowa as a State, in 1846. At one session he was President of the Council. He was usually a member of the Judiciary Committee, and as such did effective service in the shaping of important legislation. He reported from that committee the statute which was afterwards, for many years in Iowa and in Oregon, known as "The Blue Book." During this period occurred the conflict between Iowa and Missouri, known as the Missouri War. The authorities of Clark county, Missouri, in the collection of State taxes had invaded the Territory of Iowa, being ignorant of the exact location of the dividing line between the State and Territory. An open rupture followed, Governor Boggs, of Missouri, and Governor Lucas, of Iowa, calling into the field their militia. The legislature of Iowa being in session, Mr. Hastings left his seat in the council to assume command of an armed force, composed of the "Muscatine Dragoons," and three other companies of militia. It was in the middle of a bleak winter;

the troops had no tents, no forage for their horses, little food and clothing, and no arms, except pistols and bowie knives. It was anything but a formidable invading force. The expedition was not fruitless, however. The Sheriff of Clark county, Missouri, who was especially obnoxious to the invaders, was captured without bloodshed, taken back to Iowa, and lodged in the Muscatine county jail. Major Hastings was about returning with his force to Missouri, where a pitched battle would probably have been fought, as the Missouri militia had prepared to meet him, but peace was suddenly declared between the two powers, and the Iowa army was disbanded. Its leader was then appointed a Major on the Governor's staff.

Lilburn W. Boggs, the Governor above referred to, lived a long, honorable and eventful life. After the Missouri-Iowa trouble, he met Major Hastings many times in California. Here, on neutral soil, the two old enemies often went through the ceremony of burying the hatchet. Governor Boggs, a native of Kentucky, was born in 1798. He was in the war of 1812, a mere boy. He was at the battle of Thames, or Tippecanoe. His second wife was granddaughter of Daniel Boone. About 1825 he removed to western Missouri. He selected the site of the old town of Independence, of which, it is said, he was for many years the merchant, lawyer, doctor and postmaster. He was in the Council of Missouri Territory, then in the Senate of the State, then Lieutenant Governor, then Governor. He came to California, at the head of a large party, in 1846, settling first at Sonoma, where he became Alcalde, and afterwards in Napa valley, where, for many years, he carried on, on an extensive scale, the business of farming and importing blooded cattle. He died in 1861, leaving a widow, several grown children and many grandchildren. His widow died in 1880.

In 1846, upon the admission of Iowa into the Union, Major Hastings took his seat as her first Representative in the Lower House of Congress. This was the Twenty-ninth, or Mexican war, Congress. There was only one member of that body younger than he. He there met John Quincy Adams, Abraham Lincoln, Stephen A. Douglas, Andrew Johnson, and others of national fame. At the end of his congressional term, he was appointed by the Governor Chief Justice of the Supreme Court of Iowa. This position he occupied only one year. The year 1849 had arrived. He had won high political honors, but had amassed little money. What means he had been able to accumulate, he had invested in unproductive lands in Iowa. He was beginning to realize the hollowness of fame and the substantiality of coin. The news from the far West stirred him. The spring of '49 found him in the new Dorado among the earliest of the Argonauts. His short term as Chief Justice of Iowa had just ended, and he had left his family in that State, and had made the journey overland, bringing with him very little means.

"There is a tide in the affairs of men
Which, taken at flood, leads on to fortune ;
Omitted, all the voyage of their life
Is bound in shallows and in miseries."

Judge Hastings came to California at some sacrifice, much inconvenience and with some misgivings ; but he came at just the right time, and he found opportunities which he improved. He settled at Benicia. About six months after his arrival, he was chosen by our first Legislature, (December 20, 1849), Chief Justice of the Supreme Court, his associates being Henry A. Lyons and Nathaniel Bennett, both of whom are deceased. He was glad to accept this honor, as it would make him widely known in the new State and the salary was greater than that which he had surrendered in Iowa. His term was two years, which he served out. His opinions from the bench will be noticed hereafter.

Judge Hastings stepped from the Supreme bench into the office of Attorney General, to which the people elected him in the fall of 1851. He made no speeches in the campaign, but his Whig opponent, who was quite an orator, canvassed the State. The salary of a Supreme Judge at that day, \$10,000 per annum, proved to be a poor support for a professional man with a large family. While on the bench, of course, Judge Hastings was debarred from practice, and at the end of his term he was in very straitened circumstances. As Attorney General, he was enabled to conduct some law business on his own account. He soon entered upon a career of prosperity and the attainment of wealth.

The foundation, the nucleus of Judge Hastings' colossal fortune was the money which he received in the shape of law fees while Attorney General. He held this office two years, and then continued law practice. He also became a member of the Sacramento banking firm of Henley, Hastings & Co. This firm failed, but Judge Hastings himself was not much hurt by it. About this time he began to get remittances from Iowa, from the sale of his lands.

Although he was to become lord of a large landed estate, quite a long time elapsed, after his arrival here, before he invested in real property. He loaned his money on undoubted security, at three to five per cent. per month interest. After leaving the office of Attorney General, he followed his profession a year or two, meanwhile keeping large sums of money out on loan, then gave up professional life for good. He now turned his attention to city lots and country lands, gradually acquiring about one hundred pieces of real estate in San Francisco, and bought large tracts in Solano, Napa, Lake and Sacramento counties. In 1862, he was worth \$900,000, which he owed chiefly to appreciation in real estate. Twenty years later he was worth two and a half millions of dollars. The San Francisco property, standing in his name down to December, 1887, was valued at \$150,000, he having, about ten

years before, conveyed to his son, C. F. D. Hastings, in trust for all his children, city realty of the assessed value of half a million. Besides making other munificent provisions for his children, he presented to his two eldest sons an extensive and fully stocked farm in Solano county. In Napa county he reserved three large estates, enriched with vineyards, prolific in their yield of the choicest grapes. In other counties he turned his attention to the growing of wheat and wool on a large scale.

Judge Hastings was the first of our capitalists to erect dwellings for the poor of San Francisco. About A.D., 1861, he put up a large number of cheap structures of four rooms each, in the south end of the city, which he rented for ten dollars per month—a figure surprisingly low for that day. The houses were always in demand. I do not know how much philanthropy had to do with this act, but as a business venture it was a great success, the rent of the houses—small as it was—yielding a heavy interest on the investment—much larger than could be obtained from costly business structures.

Judge Hastings was married to Miss Azalea Brodt, at Muscatine, Iowa, in 1845. She, with her children, joined her husband at Benicia in 1851. At that town the family home was located for many years. Mrs. Hastings died at Pau, in the south of France, in 1876. There were eight children of the marriage—Marshall, C. F. D., Robert P., Douglas, Clara L., Flora A., Ella and Lellia. All are living, except Marshall and Douglas. I might well be forgiven for a moment's affectionate pause at the mention of Marshall's name. He had long passed his majority when called away. The heir of great wealth, he was yet never conceited, arrogant or puffed up. He was no money worshiper. He selected his companions without regard to their purses. His genuine friends were a host. They still remember his genial and generous qualities, and

“Pray for his gallant spirit's bright repose.”

In founding the college of law which bears his name, Judge Hastings secured his fame for many coming generations as a friend of learning, and did an act which will ever inspire his children and his children's children with honorable pride. For the establishment of this institution, the only law college in the State, he paid into the State treasury, in 1878, the sum of \$100,000. He made it a condition that no more than the amount of interest, which would accrue from that sum at seven per cent per annum, should be expended for compensation to instructors. Also, that the privileges and benefits of the college should not be confined to such students as intended to follow the legal profession, but should be freely extended to all. He has declared his conviction that the study of law by the students generally in all our institutions of learning would greatly contribute to the security of free government and to the advancement and elevation of the people.

In order to formally accept the donation and to carry out the views of the donor, the legislature of 1878 passed an act creating the college. By that act the officers were declared to be a Dean, Register and eight Directors—the Directors being named as Joseph P. Hoge, W. W. Cope, Delos Lake, Samuel M. Wilson, O. P. Evans, Thos. B. Bishop, John R. Sharpstein and Thoman I. Bergin, and the Dean and Register to be appointed by the Directors. The act provided further that the college should affiliate with the University of the State and be the law department thereof; that the sum of seven per cent. per annum upon one hundred thousand dollars should be paid by the State, in *two semi-annual* payments, to the Directors of the college, and that any person might establish a professorship in his own name, by paying to the Directors thirty thousand dollars.

The Directors very appropriately asked Judge Hastings to take the position of Dean, and he complied. After some years he relinquished this post and his son Robert P. was made his successor therein, the Judge taking the Professorship of Comparative Jurisprudence. Thirty dollars is the limit of expense to the student—\$10 for each year, or for admission to each class. This college although technically a part of the State University, is wholly located at San Francisco. Its students are accorded the privileges of the San Francisco Law Library, and many of them pass their hours of study in the hall of that institution. The act of the legislature, before referred to, declares that students who receive diplomas from the law college shall be entitled to practice in all the courts of the State, subject to the right of the Chief Justice of the Supreme Court to order an examination, as in other cases.

Judge Hastings was never particularly adapted to the legal profession, although he has given signal proof of his partiality for it, selected it in youth for his life pursuit, and was enabled through its instrumentality to lay the solid foundation of a great fortune. He was not cut out for either a lawyer or a judge. He is nervous, impatient, too eager to have done with the work on hand—not given to sounding the depths of inquiry. As a speaker he is ready, pointed, earnest, and exacts respectful attention, but has none of the arts or graces of the orator or rhetorician. His opinions from the bench read well, but are abbreviated, and for that cause are of little value to the lawyer or law student. They are "opinions" in too strict a sense—conclusions almost barren of exposition. His decisions in the Iowa Reports number forty-four, all rendered in one year and reported in the First Iowa, while those in California are thirty-two in two years, and all in the First California. In Iowa he did his full share of the work of the court; in California he did much less than his proportion, Judge Bennett doing most of the work. His opinions in the two States are of about the same average length—less than one octavo page of goodsized type. Of course the merit of a judicial opinion is not proportionate to its length. Some Judges (as a

New York jurist once said of a certain lawyer) in trying to be tediously clear, are clearly tedious. But it is not probable that a Supreme Judge can dispose of seventy-six appeals, take them as they come, without encountering questions which challenge profound study, specious propositions which demand subtle analysis, and confused masses of evidence which require patient sifting and arrangement—in other words, without having occasion, now and then to write an opinion, which is not an opinion merely, but an exhaustive dissertation as well. A high appellate judge should have the ability, as he will certainly find the occasion, to “hold a thought,” as did Socrates, and “inspect it as a mineralogist inspects a mineral—to strip off layer after layer of logic as one peels off the plates of mica from a specimen.”

But Judge Hastings' native tact and shrewdness always made him a welcome associate on important trials. He was a good man to counsel with in complicated cases. He was “smart,” to use a word frequently applied to lawyers. In the preparation of a case, as well as in court during the trial, he was full of happy suggestions. Sometimes quaint, there was always something in his hints and promptings, and they were generally followed with happy results. The first volume of Iowa Reports shows that, before he went on the bench of the Supreme Court of that State, he was counsel in half of the cases appealed to that tribunal.

Our hale old pioneer Judge is very tall in stature, and powerfully built; athletic, hardy, quick in movement, of dark complexion, has a finely shaped head and a countenance open, lively and playful. He is keen witted and keen eyed, light hearted, full of fun and has extracted from *existence* a vast deal of *life*.

He has a large number of men and many agents employed on his farms and in his various enterprises, but he is constantly swinging around the circle of his possessions to give them his personal oversight. His large responsibilities are not cares to him. With all his push and activity there is a good deal of the philosopher about him. His business sagacity is extraordinary. He has a Midas touch. His enterprises and investments have always been fortunate, sometimes against the judgment and protests of his friends. He has always let mining stocks severely alone.

The Judge has spent considerable time in travel and observation abroad. When Governor Seward, after leaving the office of Secretary of State, made, in 1869, a trip to Alaska, which territory had just been acquired by the United States through his diplomacy, Judge Hastings, who was an old friend of Seward, accompanied the latter, at his invitation. He reciprocated this attention when Governor Seward tarried at San Francisco on his voyage around the world. During their stay of two weeks the Governor and his party were the guests of Judge Hastings, and were present at

the marriage of the latter's eldest daughter to Colonel Catherwood. It was then agreed between Governor Seward and Judge Hastings that, upon the completion of the former's world voyage, the two should meet at New York City and sail for the North Sea, to explore the northwest coast of Norway. Upon his return to New York City, the Governor by letter requested the Judge to meet him, and suggested that they, before setting out on their voyage to the North Sea, pass a few months at Auburn, the Governor's home. The Judge repaired to New York City, where he learned the fact of Governor Seward's death at Auburn. He then returned to California. He was a great admirer of Seward, although they differed in both politics and religion. He regarded the "Sage of Auburn" as the greatest ethnological philosopher of his time.

Judge Hastings' conversation is charged with wit and pleasantry. His humor is perennial. He is as fond of a joke as was the elder Judge Baldwin. He has said more good things than did Judge Baldwin, although his pleasantries are on the whole below the Baldwin standard and will have shorter life. I am reminded of the brief partnership in law between Baldwin and James B. Haggin, who has of late years devoted himself chiefly to breeding and speeding blooded horses. Haggin is a true lawyer, well grounded in the living principles of the science. He withdrew from practice about the same time Hastings did, and for the same reason; he had realized more than his wildest dreams in the line of money getting, and had survived all incentive to forensic effort, all ambition for professional fame. Baldwin & Haggin had their office in Court Block. That other Midas, Lloyd Tevis, Haggin's business partner, had an office adjoining, and Hastings' office was next to that of Tevis. Haggin and Tevis married sisters, accomplished and queenly women, daughters of the late Colonel Lewis Sanders, a Mississippian, who, very many years ago, gave Jefferson Davis his first "send off" in political life; he was very influential in Mississippi politics, and was the spokesman of Davis in the convention which nominated the latter for Governor. Haggin & Tevis are also partners in business—that is, they have pooled their capital—and have been thus together for thirty-two years! They are also warm personal friends, and are both Kentuckians. All resemblance between them here ends. Haggin is silent, phlegmatic, cold, imperturbable. He never laughs, and rarely smiles. Tevis—who, by the way is admitted to the bar also—is a man not far removed from Hastings. He is vivacious, talkative, active, ubiquitous. His skill as a financier, his business diplomacy, tested in conflicts between great corporations, and his brilliant triumphs in the commercial world, have crowned him the monarch of moneyed men. From this it might appear that if either were given to speculation, it would be Tevis, but not so. He feels his way as though he were blind; while the silent, unruffled

Haggin has made many uncertain ventures in mining stocks. They turned out well, however. Haggin, in 1862, sold out to William M. Lent his Gold & Curry stock—*feet* they called it then—at an immense advance upon his investment. Then Tevis, who had been long disquieted, was happy again. "He did magnificently," said Tevis; "still, my advice to him was correct. We are doing a splendid business, and a safe business. We ought to let mining stocks alone."

Tevis is the head of the great banking and express business of Wells, Fargo & Co., but as he is also, or was, a lawyer, he is in a measure my property, and so long and close were his relations with Hastings that, before returning to my subject, I cannot forbear telling how Tevis got his start in life.

Lloyd Tevis came overland to California in 1850. He pitched his tent at Sacramento. "I owe my fortune in life," I have heard him say, "to my good penmanship." He had no money, and just then felt a woe-begone sensation which he has never experienced since. He was a rapid and beautiful penman. He now writes too much to write well—more, probably, than any other man in California, and sometimes his signatures, as President of Wells, Fargo & Co., are burlesques upon the old-time autograph. In his strait in 1850 he thought of the County Recorder's office. Happy idea!

"Can I get some copying to do?" he said to the Recorder, as he entered the latter's office next morning. "I am a rapid penman, and would like to give you a specimen of what I can do."

The Recorder said nothing for a moment, for the applicant immediately commenced writing his "specimen."

Write on! Write plainly, and swiftly, and roundly, and grandly, young applicant! It is written, plainly and swiftly and roundly and grandly, in the book of fate—what?

We shall see.

"Your penmanship, would, I think, be satisfactory to anybody," said the Recorder, slowly examining the proffered specimen; "but [it looked like a big *But*] I have three deputies, whom I pay \$300 a month each, and, while my business is good, my deputies can do it all. I want no more help."

If Tevis had walked out of the office, mad, without saying "Good-day!" that might have been his last opportunity.

He didn't.

"Will you permit me, sir," he asked, "to come to the office every morning and write up the deeds, mortgages, etc., which the deputies may have left over on the close of the previous day? If there should be no extra work, of course I will get nothing; if the deputies leave over anything for the next day, I will do it and leave my compensation to you."

"That is all right," said the functionary.

Tervis asked for and received a key to the office, and next morning he inserted that key in its appropriate lock at seven o'clock. The deputies were to arrive at nine A. M. It was their custom to place in a certain tin box all papers left over for record on the following day. Tervis took every paper from that receptacle—there were ten or a dozen of them; he opened his big record book, and—then and there he started on his grand triumphal financial march through life. When nine o'clock and the deputies arrived there was nothing to be recorded. Things were at a standstill until fresh conveyances came in.

This happened every day for a week or so, and the deputies, listless and lazy, not warned of the catastrophe impending, rather liked the help of the young intruder, and welcomed his daily presence. Alas, poor scribes!

"Now, Mr. Recorder," said Tervis one fine afternoon, just after the office had closed, and all the deputies had departed, "I hope you will let me make you a proposal."

"Go on," was the reply.

"For a week or so I have done nearly all the work of this office. I *can* do *all* of it. Your clerical assistance now costs you \$900 a month. How long can you afford to pay such salaries? Do you expect the flush times will last forever? Hear me. I will do the work of your three deputies—all of it—for the pay of *one*. What say you?"

"You will do all the work of this office for three hundred dollars per month?" queried the official.

"Yes, sir," said Tervis; "and do it better than it has been done."

He was "engaged."

In that office he patiently and diligently labored until his employer's "little, brief authority" ended—over a year. He laid away \$250 per month; and when his clerical services were wanted no more, he was a capitalist in miniature—and from the miniature he speedily developed into the colossal. Mr. Haggin just then joining him with a little money, they made a loan of one thousand dollars at ten per cent. per month, upon which they collected *five thousand dollars interest* before the principal was paid.

"When I came to California," said Tervis one day, to some friends, "young, poor, ambitious, I had to decide whether I would strike for political fame or for money. I concluded to go for money." He went for it.

When the war of the Rebellion was at its most rebellious latitude and longitude, intense animosity toward Southern men resident in San Francisco was cherished by a large part of the community. Southerners here—among whom were some of the wealthiest citizens—were alarmed for the safety of all they held dear. General George Wright, afterwards lost on the Brother Jonathan, then commanded this department. The leading Southern men,

mostly large taxpayers, held a conference, at which it was agreed that an address or memorial should be sent to General Wright, in which the peaceable inclinations of Southerners here resident should be set forth, coupled with a request for security against mob violence. Lloyd Tevis was appointed to draft this paper. The memorial, as written by him, covered thirty-six pages of letter paper. At the request of Tevis I delivered this paper to General Wright. I forget what the General said upon receiving it, and do not know that he answered it. When Tevis handed it to me he said: "I have written these thirty-six pages without once putting a blot upon the paper or running my pen through a single word."

To return to Judge Hastings and at the same time not part company with Haggin and Tevis for a moment longer, a practical joke recurs, played by the Judge on his two friends, about A. D. 1861, my authority being a former agent of the party of the first part. Messrs. H. and T. while not churchmen, are churchgoers, very regular in their habits, and watchful of their reputation for morality and virtue. From long before sunset to long after sunrise they are at their homes. Each is a model paterfamilias. At the time referred to, Judge Hastings, who never cared much for appearances, was lodging in a plainly furnished room in one of his shanties on Virginia street, his family being at Benicia. Haggin and Tevis had occasion to visit their office one night, and Hastings dropped in upon them. About ten o'clock all three started up Washington street in company (no cable lines then). When the entrance to the Bella Union Melodeon then on Washington street, fifty feet west of Kearny—was reached, Hastings stopped and said blandly: "I say, Haggin, you and Tevis come in here with me just for a little while."

"What is it?" they asked

"I want to show you something artistic," replied Hastings; "come in; we'll not stay long; I'm going up the hill with you."

He pulled them in. They followed their leader right up to the front row of seats. There were no vacant chairs, which added greatly to the Hastings' enjoyment. Just then the curtain rose on one of the sensual scenes of the programme, and voluptuous arms and so forth dazzled every eye. The scene was "Cupid taken captive by Hyella," so gracefully paraphrased by Tom Moore from the Latin of Andreas Negerius.

"As fair Hyella, through the blooming grove,
A wreath of many mingled flowerets wove,
Within a rose a sleeping love she found,
And with the twisted wreaths the baby bound.
Awhile he struggled, and impatient tried
To break the rosy bonds the virgin tied,
But when he saw her bosom's milky swell,
Her features where the eye of Jove might dwell,

And caught the ambrosial odors of her hair,
Rich as the breathings of Arabian air,
'O, Mother Venus,' said the raptured child,
By charms of more than mortal bloom beguiled,
'Go seek another boy, thou'st lost thine own.
Hyella's bosom shall be Cupid's throne.' "

The representation was soon over, and Haggin and Tevis suddenly realizing where they were, looked at each other and bolted, Hastings following. The latter would not accept any rebuke from his companions. He always insisted that the scene presented to them was full of beauty and suggestion.

The elder Judge Baldwin used to tell this on Hastings :

The latter was residing at Benicia, but he kept a barrel of money with Tevis in San Francisco. One day when he had been taking some very agreeable medicine for a cold, and felt somewhat exalted, he was approached by a carpenter he knew and asked for a loan of a thousand dollars to enable the petitioner to open a well appointed carpenter shop, and establish himself in business in good style. He promised to do the favor. The next day when he was looking at worldly affairs with other eyes, as it were, the carpenter waited on him and reminded him of his promise. Insisting that he did not recollect the occurrence of the previous day, the Judge being importuned, very reluctantly gave his check on Tevis for a thousand dollars. The happy carpenter after expressing his thanks once for each dollar, went home, put on his best coat and hat, and started for the wharf to take the river boat for "the city." While waiting on the wharf he looked at his check. It bore no signature.

The omission was never rectified.

When the late war broke out in this country, Judge Hastings very sentimentally stated his position. He was in favor of both secession and coercion. "I believe a State has the right to secede," he said, "and I believe the other States have a right to whip her back." Judge Baldwin and other Southern friends of his could not see just where the laugh came in here.

"Haggin," said Hastings one day, during the war, the event of which was just beginning to cast its shadow before, "I'll tell you how this country might be reunited and its great armies provided for at the same time."

[Grant had not yet climbed to the top of the ladder on one side, and Stonewall Jackson still survived on the other. It will be remembered that some wise statesmen, before the war closed, thought they foresaw danger to the political and social states from the sudden disbanding of the armies, and sending the soldiery without employment into every nook and corner of the land.]

Haggin quietly inquired: "How?"

"Let the South consent to have its army incorporated with that of the North, and let the North consent to have Stonewall Jackson placed at the head of the combined forces." He paused.

"What to do?" asked Haggin.

"To lead them into Canada," he continued, "and to wrest from Great Britain every inch of land held by her on this continent. It could be done, and Uncle Sam would be rich enough to give every soldier, and every soldier's widow and orphan not only a farm, but a whole township. What do you think of it?"

"I don't intend to think much about it," said Haggin.

Judge Hastings has done considerable for education and science. He contributed to the foundation of St. Catharine's Convent and School at Benicia. He is a life member of the Society of California Pioneers and the Academy of Sciences. The two volumes of "Botany of the Pacific" were issued at his expense and that of a few other wealthy citizens of this State, whom he induced to contribute. He did this at the request of Professor Gilman, Sir Joseph Hooker and Dr. Asa Gray. His zeal and liberality were warmly acknowledged by Dr. J. D. Whitney in his prefatory note to the second volume. He is a good Latin scholar, a great reader, and has gathered together books of every class, from every clime and of all ages. His library is large, well selected and contains a great number of rare works. He has now practically retired from the busy world, and his travels are probably over. He has become thoroughly weaned from Benicia and has settled himself down for the balance of his days at Lakeport, Lake county. He is President of the principal bank of that section, the Bank of Lake. The duties of this position engage very little of his time. His visits to San Francisco are few. A great deal of his life is passed on the beautiful lake and the delightful places of resort which distinguish that part of the State. His sprightly talk and genial manner make his presence always welcome wherever he goes.

During his last stay in London, after returning from a ramble over "the continent," the Judge, who had become very widely known in "modern Babylon," was waited on by an enterprising young knight of the quill, who expressed his readiness, desire and ability to trace the Judge's pedigree to the fountain head in remote antiquity. He asked to be permitted to write the family history—complete in one volume. Compensation, £100. He was authorized to go ahead. In due time he presented himself before the Judge with manifold manuscript. He was requested to run over the long lineage orally—the manuscript would be read at leisure. The antiquarian promptly commenced with the beginning and progressed down to a time within the memory of men still living. There were two sons of a certain baron of fabulous wealth, named Rutherford. [The Judge afterwards named Rutherford's Station, Napa county, after this ancestor.] The eldest son, who,

according to custom, inherited everything, went abroad on a voyage of years, leaving all his possessions in charge of his younger brother. Upon his return home he found that, as the agent of Judge Heydenfeldt's father did a century later, his brother and confidant had sold him out entirely and emigrated to America——"

"Stop right there ! Stop !" said Judge Hastings. "You have traced me to a thief. I want to hear no more. Here's your money, but stop."

This is a good place for me to stop also.

CHAPTER XIX.

Rufus A. Lockwood and Edmund Randolph—Lockwood's Strange Career and Tragical End—Changes His Name—Rash Enlistment as a Common Soldier—A Longshoreman in San Francisco—A Lawyer's Janitor at Ten Dollars Per Day—Leading the San Francisco Bar—Sudden Departure for Australia—Herding Sheep as a Penance for Sins—Return to this Country—Before the United States Supreme Court—A Picture by Hon. Newton Booth—Edmund Randolph's Brilliant Record—A Man of Splendid Visions—The great case of the New Almaden Quicksilver Mine—Caustic Treatment of the Millionaire Lawyer, Frederick Billings—Connection with Walker's Scheme of Empire.

"Who is Lockwood?" inquired the banker Palmer of General McDougall and Judge Hastings, at San Jose, in 1851. The legislature was then sitting in that town, and the great firm of Palmer, Cook & Co. was seriously concerned with the business of the session. Mr. Palmer was on hand—an influential member of the Third House. His firm being, either by ownership or claim, interested in a large slice of San Francisco, and being involved in heavy law suits, which called for the aid of the ablest counsel, Mr. Palmer, one night in his room, in the course of a conversation with his two visitors above named, handed to each a marginal slip from a newspaper, with the request that they would write the name of the man who was, in their opinion, the best land lawyer who had nailed his shingle to the Golden Gate. Both General and Judge, distinguished at the bar, wrote at once the name Lockwood.

"Who is Lockwood?" asked the banker, for both banker and lawyer were newcomers. "He is the man you want," they assured him. So he was, and so they found him to be.

"Who was Lockwood?" A quarter of a century has elapsed since he lay down to his final rest—upon the ocean's bed.

His life was stranger than fiction. Born under an evil star, with a noble nature to be ever thwarted, a powerful intellect to be ever set on fire by the fever of his blood, it was his destiny to wander over earth and ocean, pursued as it were by some fiend of darkness, from the outset of his career to that supreme hour when the waters of the Atlantic closed over his body, to bring, let us hope, a calm to his storm-swept soul.

On the steamship Central America, in the fall of 1857, his troubled life was ended. He was going from San Francisco to New York. A friend who knew his misfortune and who believed the proposed trip to the East was suggested by eccentricity, rather than by the demands of business or health, urged him not to go. "I will stay if you insist," he answered, "but I feel

that I shall go mad if I do." He went. When the tempest was toying with the vessel, and the passengers were at the pumps, he, after doing duty some time, stopped and went up to the cabin. An officer ordered him back. He replied: "Sir, I will work no more." He died as he had lived, an enigma. Entering his stateroom he closed his door upon the scene, shut his eyes upon the light of life, and went down with the wreck.

The true name of Rufus A. Lockwood was Jonathan A. Jessup. Lockwood was his mother's family name. He was born in Stamford, Connecticut, in 1811. At eighteen he entered Yale College. For about one year he was diligent in his studies and advanced rapidly. Suddenly—a step in keeping with his after life—he left college and entered as a sailor on a United States man-of-war. The vessel made a short voyage to the Bahamas, and returned to New York City. There he deserted and there he first took the name of Lockwood. On the return voyage he had determined to desert, if possible, because one of his messmates had been tied up and flogged. Working his way to Buffalo, on the Erie canal, he proceeded by schooner to Chicago.

This was in 1830, and Lockwood was nineteen. He had no money and knew nobody. Meeting a farmer from Tippecanoe county, Indiana, he was engaged to teach school at Romney, a hamlet in that county. He taught at Romney and Rob Roy, an adjacent village, alternately for about one year, and devoted his time out of school to the study of medicine. He had some slight trouble with his patrons at Rob Roy, and, without notice to any one, started one bitter cold day, over an eight mile stretch of snow for Romney, where he arrived at night with hands and feet badly frozen. When he got well he resumed teaching at Romney, and joined a debating society, in which his argumentative powers first excited remark. Now, also, he commenced to read law. It is said that he almost literally committed to memory the text of Blackstone. He removed to Crawfordsville, opened a school and continued his law studies. Here he had another quarrel—with the principal of a rival school. It didn't lead to much, being a newspaper controversy. He was admitted to the bar by the Circuit Court of Crawfordsville, and, though penniless, got married and went to Thorntown, Boone county, to practice. He was soon sued by his landlord, and pleaded as a setoff an unpaid tuition bill. He was his own lawyer and lost his case. He wanted to appeal, but could not give a bond. He and his bride soon found themselves without a bed, that useful article of their scanty household goods having been sold by the constable under execution issued on his landlord's judgment. "I never knew how my wife lived at Thorntown," he said many years afterward. "I know I lived on potatoes roasted in the ashes."

He lost his second case, also, but having for a client somebody else this time, an appeal bond was filed, and Lockwood made his first appearance in

the Supreme Court of Indiana. Being first examined and admitted to practice in that tribunal, he argued his cause in a style so masterly as to win the encomiums of the bench. (See *Polk et al. vs. Slocum*, 3d Blackford, 421.) But for several years he struggled on, with little business. His home, too, if such it could be called, was unhappy. His only pleasure was in study.

In 1836, Albert S. White, a prominent lawyer of Lafayette, Indiana, offered him a partnership, which he accepted. In that year he made a remarkable and successful defense of J. H. W. Frank, a young editor who had killed John Woods, a well known merchant. The slayer and the deceased belonged to opposing political parties. They were strong partisans, and party lines were sharply drawn in the community. The difficulty grew out of a wager won by Frank. It seemed impossible to get a jury that would agree. Lockwood made an argument of nine hours, which has been pronounced "the best jury speech ever made on this continent—or any other." He secured an acquittal, and won great popularity. He was now only twenty-six years old, and, his partner being elected to Congress, he, for the first time since he ran away from college, took a long breath in the consolation of success.

His hands were full and his mind comparatively calm for several years. This period must have been an oasis in his life.

But in 1842, a business depression, such as every now and then visits every community, came upon his section. He had invested in lands, which now would not sell for enough to pay his debts. He scraped together what money he could, gave all to his creditors, except a few hundred dollars, placed his son in a Catholic school in Vincennes, and struck out for "parts unknown," not even letting his family know his purpose. He went to the City of Mexico, where he was a stranger in a strange land. He studied the civil law and the Spanish language, was taken sick, could get nothing to do, and after a stay of a few months, went to Vera Cruz, which he reached with \$2 in his pocket. He risked this little balance at monte, and won \$50, with which he went to New Orleans; thence to Natchitoches. There he resumed his true name of Jessup, and continued the study of the civil law, which was in vogue in that State, and the Louisiana code. After a year he went to New Orleans and applied for admission to practice in the higher courts of Louisiana. He passed the examination, but just as the oath was about to be administered to him, he saw in the court-room the man who had sued him and caused his bed to be sold under execution. Before he left Indiana he had availed himself of several opportunities to wreak his vengeance upon this man, and now, fearing that his old enemy would expose his change of name, he left the room without taking the attorney's oath. A few days later a prominent Indiana lawyer met him on the street in New Orleans, very elegantly clad. He asked a loan of \$20 to redeem his trunk. The Indianian

proffered \$10—all he had on hand. Lockwood declined it, saying it was of no consequence. The same day he enlisted as a United States soldier, received \$20 bounty, and was sent into Arkansas. Edward A. Hannegan, then United States Senator from Indiana, who had formerly known Lockwood, heard of the latter's latest freak, and sent him an order of discharge, signed by President Tyler. He also remitted to him \$100, and urged him to go home to his family. Lockwood did so, and resumed law practice at Lafayette. His lands had been making money for him in his long absence by largely appreciating in value, and he soon paid off the balance of debt he had left behind three years before.

In 1849 Lockwood lost an important will contest. He thoroughly believed that the alleged will should not be admitted to probate, and, moreover, being a strong hater, and one of the principal legatees named in the proposed document having provoked his wrath some time before, he went into the trial with a determination unparalleled. He addressed the jury during the whole sessions of the court for three days. The verdict was against him, and when he heard it he struck his fist violently on the table, declared that he would never try another case in that court, and left the room in great excitement.

Then he turned his eyes toward California. A friend, Mr. E. L. Beard, was also looking this way. The two came—Beard, through Mexico; Lockwood, around the Horn. It would seem that when Lockwood first thought of emigrating to California the disgust which he felt over his defeat, just mentioned, made him despise his profession; for, instead of packing his law books, he determined to bring a large stock of liquor in small bottles and retail it to miners. He abandoned this notion, however. His strange record has not this blemish. Beard settled at a fine spot, the Mission San Jose, in the southern end of Alameda county. One day he heard a bugle blast! He listened and heard it again. "That is Lockwood!" he said. It was he. It had been agreed between Beard and Lockwood, in Indiana, that both should provide themselves with a bugle of a certain kind, in order that when either should come upon the other in the unknown Dorado of the West, he might fittingly announce his approach. Thus met the friends at the Mission San Jose. Beard had established a comfortable home, and Lockwood looked as if he needed its hospitable shelter. He was dirty, tired, hungry, wet and sick. He had got lost on the Alameda mud flats, and had tramped all night long. He now met a friend, in time of need, but was he at home?

Alas, poor wanderer, you have no home! Hot fugitive from fate, not yet is respite found! No mighty voice cries out, reprieve! Not yet, not yet, looms up the long sought goal! Rest you awhile, then journey on upon your lifelong tramp!

"Is it true, O Christ in heaven, that the bravest suffer most?
That the strongest wander farthest, and more hopelessly are lost?
That the measure of man's merit is capacity for pain,
And the sadness of the singer gives the sweetness of the strain?"

Having recuperated, Lockwood came to San Francisco. On the ocean voyage he had studied medicine, and tried to forget the law. He did not, however, ask for a diploma. He treated himself at his friend Beard's house, the day he arrived there. He bled himself, and found relief, after a regular physician had told him that if he did so, in his then condition, it would be certain death.

In San Francisco, he went into the law office of the eccentric Horace Hawes, and asked for a clerkship. He was thirty-nine years old, a great genius of the law, and he wanted a clerkship! He got it. Hawes examined him, but not very exhaustively—he soon made a discovery. It was agreed that Lockwood should perform the double office of clerk and janitor—time, six months; terms, ten dollars per day, to be paid daily. Those were flush times, be it remembered. Here was an association to make men wonder, if not weep. Eccentricity was the only peculiarity common to both. Hawes was rich; Lockwood was in rags. Hawes was supremely thoughtful of self; Lockwood supremely negligent. Hawes was an iceberg; Lockwood, a pillar of fire.

Lockwood gambled off his daily wages, but faithfully performed his duties, and when his six months were passed, he was offered a partnership. He refused promptly, and, in language not heard before by his employer, he expressed his disgust with his experience in that office. By this time Lockwood had come to be well known to the bar, and concluded to re-enter the ranks. He soon revealed himself. In the summer of 1851 he formed a partnership with Frank Tilford and Edmund Randolph. Randolph was from Virginia, by way of Louisiana; Tilford came direct from Kentucky. They were able lawyers and knightly men. Tilford had just left the office of Police Judge, then called Recorder, and had just also been defeated for Mayor by a small majority, by T. Butler King, the Whig candidate. He afterwards, having practiced law at a dozen different points on this coast, permanently settled at Denver, Colorado, where he died in 1886. Randolph died in San Francisco in 1861. I will devote half of this chapter to him.

These three men made as powerful an alliance as was ever effected at this bar. It was the leading firm for a time, but its time was short. While it held together, it brought the most important suit instituted here for many years—Metcalf vs. Argenti and others. The defendants were members of the Vigilance Committee of 1851, and, deputed by that body, had searched the premises of the plaintiff. The latter asked \$50,000 damages. The legality and propriety of the organization and acts of the Committee were involved,

and as the vast majority of the citizens either belonged to or sympathized with the Committee, the trial of this cause was watched with universal interest.

The first trial of this cause was commenced on Saturday, August 15, 1851. On Tuesday the trial was interrupted and suspended by the tumult consequent on the rescue of Whittaker and McKenzie by the Governor and Sheriff from the Vigilance Committee, which afterwards re-took the men and hanged them. The evidence was closed on Thursday evening, and on Friday the jury were addressed by Mr. Randolph for the plaintiff, and Isaac E. Holmes for the defendants. On Saturday morning, August 23d, Lockwood closed the argument for the plaintiff in a speech of four hours. The jury disagreed, as they also did upon a second trial.

At the close of his short partnership with Tilford and Randolph, which he abruptly terminated, Lockwood took one of the strangest steps of his strange life. Just as he had put himself at the head of the profession here, and his fame had spread over the State, he walked out of his law office and went to the water front, where, for several weeks he worked as a longshoreman. A client who needed his professional service persuaded him to quit this new employment, Lockwood insisting that his fee should be in the shape of daily wages. Shortly thereafter he became the regular counsel for the great banking and real estate firm of Palmer, Cook & Co., before mentioned, and obtained a large practice. His receipts for a year or more were very large, but they went to the gambling table. It is said, however, that about this time he sent ten thousand dollars to Senator Hannegan, of Indiana, in return for the one hundred dollars that gentleman presented him a few years before, when he had been discharged from the army.

In the summer of 1853, Lockwood took a new departure—for Australia. He knew no one there and did not take a dollar with him. He remained about two years. He could not practice his profession because of a law requiring seven years' residence. He acted as a lawyer's clerk, a merchant's book-keeper, and a herder of sheep! From the first named occupation he was discharged for not copying into a brief a paragraph which he said was not law.

On his return here in 1855, he said his trip to Australia was the sanest act of his life; that he wanted to do some great penance for his sins and follies and to put a great gulf between him and the past. Indeed, a change for the better was noticeable in him. He stopped the habit of gambling, and was calmer in thought and manner. His high sense of professional honor was strikingly illustrated by his refusal to take a large fee to defend the famous "Peter Smith titles," owing to the fact that he had once expressed the opinion that these titles were invalid.

In the fall of 1855 Lockwood went to Washington, and in December of that year he made a long argument in the United States Supreme Court, in the case of *Field vs. Seabury*. Returning in the spring, he continued practice here until the fall of 1857, when—and while on another trip to the East on business—he perished as before stated on the steamship *Central America*.

I get my facts for this sketch from a most interesting and finely written notice of Lockwood, contributed by Hon. Newton Booth to the *Overland Monthly* in 1870, and copied by the *Albany (N. Y.) Law Journal*. Therein is presented this picture of Lockwood's personal appearance in 1855:

"Height, above medium ; figure, large and ungainly ; movements, awkward ; complexion, sallow and tobacco smoked ; eyes, dark and deep, with dilating pupils edged with yellow—cat eyes in the dark ; hair, dark brown, sprinkled with gray ; head, feet and hands, large—the left hand webfingered ; features, not irregular, but without play or mobility, with a fixed expression of weariness ; dress, careless, almost slovenly ; age, fifty years, bearing the burden of four score."

Hon. Newton Booth is a master of the art of expression, and his fame as a public speaker and the general tone of his addresses have associated him in popular thought with the legal profession. In his article on Lockwood, he writes as a lawyer might, and very felicitously. But the ex-Governor declared to me in Sacramento, in June, 1882, that he had never been a lawyer.

This fine view of Lockwood in the argument of the case of *Field vs. Seabury*, in the United States Supreme Court, is from the article referred to, which was written about two years before the author became Governor of California:

"More than the usual number of spectators were present, and there was something more than curiosity to hear this lawyer, who had often been heard of, but never before heard in that court. The consciousness of this curiosity and expectation embarrassed him in the opening of his speech, but his mind fairly in motion soon worked itself free, and his phlegmatic temperament glowed to its core with flameless heat. For two hours he held the undivided attention of the court in an argument that was pure law. He had that precision of statement, skill and nicety in the handling of legal terms, which modulate the very tones of the voice, and by which lawyers instinctively measure a lawyer—that readiness which reveals an intellectual training that has become a second nature—that self-contained confidence that is based on the broadest preparation—that logical arrangement which gives the assurance that back of every proposition is a solid column to support it if attacked—and that strength and symmetry of expression which carry the conviction that behind utterance there is a fullness of knowledge that floods every sentence with meaning, and an unconscious reserve of power which gives to every word a vital force."

EDMUND RANDOLPH was the scion of a long, puissant line of men, commencing with the pioneers of American freedom. He left an antique home, flooded with revolutionary glories, and came to the remotest dominion of the republic, himself a pioneer in the work of founding a free empire upon virgin soil. Bringing with him the stimulus of a high ambition and the heritage of ancestral fame, he approved himself the heir of moral excellence and of great intellectual power.

He was born in Richmond, Virginia, in the year 1819. He attended the ancient and celebrated college of William and Mary in that State, one of his fellow students being the Hon. Archibald C. Peachy, who came to be for many years a prominent and wealthy lawyer of San Francisco, and who died in June, 1883. As Randolph sat at his desk in that historic institution of learning, his eyes daily fell upon one of the noblest triumphs of the sculptor's art—a tablet of carved marble erected to the memory of his remote ancestor, Sir John Randolph. Sir John came from England to Virginia early in the last century. His first son, John, was the great-grandfather of the California lawyer. His second son, Peyton Randolph (born in Virginia, 1723, died in Philadelphia, 1775), was twice President of the Continental Congress. Sir John's grandson, Edmund, grandfather of my present subject (born 1753, died 1813), was Governor of Virginia, Attorney General of the United States under Washington, and succeeded Jefferson as Secretary of State. A fine portrait of him may still be seen in the Attorney General's office at Washington.

Between the first Edmund Randolph and his grandson of the same name came Peyton Randolph, named after the patriot before mentioned. This second Peyton Randolph was also a lawyer of distinction. He married Maria Ward, the only girl whom the eccentric John Randolph of Roanoke ever loved—according to his own confession. [It may be stated here that the families of Sir John Randolph and John Randolph, of Roanoke, were not related.] Maria Ward was a noted belle; perhaps the most beautiful and accomplished American woman of her day. Lewis and Clark, in their explorations of the great unknown west in 1803-4, named a river "Maria," after this maiden. Maria Ward was the mother of Edmund Randolph, our subject.

Upon graduating from William and Mary College, Edmund Randolph attended the University of Virginia for one year, chiefly as a student of law. Then removing to New Orleans, he obtained, by appointment, the office of Clerk of the United States Circuit Court for the circuit of Louisiana. Pursuing his legal studies, he was, after a few years, admitted to practice, and followed the profession in the Crescent City until 1849. He married in that city the daughter of a leading physician, Dr. Meaux—a lady whom he had met in Virginia some years before. He arrived in California in 1849. A

few weeks later, he was elected to represent San Francisco in the lower branch of the legislature—at the first session of that body, which opened at San Jose, December 15, 1849. This body met to organize a State government. It was known as the "Legislature of a Thousand Drinks." This title was not given it on account of the intemperate habits of the members, as popularly supposed, but owing to the words invariably uttered by Senator Green of Sacramento, when inviting friends to his sideboard: "*Walk in, gentlemen, and take a thousand drinks!*"

In one of the museums of London may be seen crayon sketches, by an English artist, of all the members of the legislature at this session. Every man had a "flop" hat and a "hickory" shirt. Mr. Randolph was a leader of the lower house throughout the session. State officers and United States Senators having been chosen, he was appointed, with John Bigler, to wait upon the Provisional Governor, General Riley, and inform him of the organization of the State government. The committee requested General Riley to turn over to the State Treasurer the "civil fund," aggregating \$1,300,000, collected by the United States army and navy officers, without legal authority, since the acquisition of the country. General Riley refused to do this, but turned the fund into the federal treasury, although he had paid therefrom the expenses of the State Constitutional Convention. The Legislature was accordingly compelled to borrow money, issuing bonds bearing three per cent. per month interest.

The journal of the Assembly for this first session shows that Mr. Randolph and the late A. P. Crittenden were among the most industrious members. But both gentlemen favored the adoption of the civil in preference to the common law. That the common law prevailed is due to Judge Nathaniel Bennett, perhaps, more than to any other person, he being then a State Senator. After the close of his legislative term Mr. Randolph never held public office, but frequently appeared in political conventions and on the "stump". He was a devoted and conspicuous practitioner at the San Francisco bar until his death. Early in 1851 he formed the partnership with R. A. Lockwood and Frank Tilford, already stated in this chapter.

The greatest cause in which Mr. Randolph was ever engaged was the most important civil action ever tried in California. It was a contest between the United States Government and the assigns of Andres Castillero, and involved the title to the great Almaden quicksilver mine, in Santa Clara county, together with two square leagues of land adjoining the mine. The whole property in dispute aggregated in value several million dollars. Mr. Randolph was introduced to the case by his lifelong friend, A. P. Crittenden, who was attorney for the "Fosset" claim to the mine, those representing the Fosset claim, of course, desiring to see the government triumph over Castillero.

The history of the discovery of this remarkable mine and the twenty years' litigation which followed it, would make a volume in itself. It is full of interest. The mine was discovered by Andres Castillero, a wealthy Mexican, in the year 1845, when California was a Mexican territory. After the acquisition of this country by the United States, Congress having established in San Francisco a Land Commission to settle private land claims in California, a petition was filed by Castillero with this commission, September 30, 1852, asking that his claim to the New Almaden mine, and two square leagues of adjoining land, be confirmed to him. Halleck, Peachy and Billings were petitioner's attorneys. The claim was opposed by the United States through the U. S. Land Agent. The Land Commission confirmed Castillero's title *to the mine*, but denied him *the land*. On appeal to the United States District Court, a great legal battle ensued. Both parties were appellants and both respondents, neither being satisfied with the decision of the Land Commission. On behalf of Castillero appeared Reverdy Johnson, Judah P. Benjamin and Archibald C. Peachy; on the part of the government, Edwin M. Stanton and Edmund Randolph. The full proceedings of this trial were printed by order of the government. They comprise five large octavo volumes. Mr. Randolph's closing argument for the government covers three hundred printed octavo pages.

It will be borne in mind that Castillero claimed the mine, *and* two square leagues of land; the Land Commission confirmed to him the mine, *without* the land. To the outsider who knows nothing about the equities of this case, this might seem to be a fair compromise. But it satisfied neither party. The government was not willing to take the land and surrender the mine, and Castillero was not satisfied to take the mine and give up the land. The decision of the United States District Court was affirmatory of that of the Land Commission—the *mine* to Castillero, but *not* the two square leagues of land.

The case was taken to the Supreme Court of the United States and that tribunal decreed that Castillero was not entitled to either the mine or the lands. But before it was argued in that august tribunal Randolph died. He had received a fee of \$5,000, and expected a large sum in addition. The United States being his clients and the property at stake being of such immense value, he felt that his services, covering some four years' time, would receive princely remuneration. However, the \$5,000 paid him as a retainer, was all that he received. After his death his widow presented a claim to Congress for \$75,000. A petition accompanied the claim signed by fifty leading lawyers of San Francisco setting forth that Mr. Randolph's life was sacrificed to this case, and that considering the magnitude of the interests involved and the length of the controversy, the sum asked by his widow was reasonable. On final settlement the government paid Mrs.

Randolph \$12,000, making \$17,000 paid for Mr. Randolph's services. The government paid Mr. Randolph's coadjutor, Edwin M. Stanton, \$25,000, although the whole burden of the case was upon Mr. Randolph.

The counsel on the opposing side, Reverdy Johnson and Judah P. Benjamin, received \$35,000 each, this fact being disclosed in a letter from Mr. Johnson to Hon. T. J. Durant, of Washington. In that letter Mr. Johnson stated that the great labor of collecting the evidence for the government in the New Almaden case devolved wholly upon Mr. Randolph; that the latter argued the case at great length and with great ability; and prepared an elaborate brief, which, after his death, was used on appeal in the United States Supreme Court. Mr. Johnson added that he would not perform the services rendered by Mr. Randolph for less than \$25,000.

In the judgment of Mr. Randolph's friends Congress would have allowed the whole of the demand of \$75,000, but for the opposition of Senator Edmunds. Senator Edmunds has the reputation of a great lawyer, as well as statesman, and, of course, his influence is potential. It is said that his opposition to the claim of Mrs. Randolph was inspired by Frederick Billings. Mr. Billings was at the time, and is still, one of Senator Edmunds' constituents—a lawyer, a railroad magnate, a bondholder—possessed of a colossal fortune, a man not to be despised by any means. He had been a member of the firm which brought the Castillero suit, and which had been antagonized by Mr. Randolph during the many years of litigation which followed. Whether Mr. Billings believed that Mr. Randolph had not earned his fee, or rather his widow's demand, or whether he permitted a personal grievance to influence his action, it is not for me to say. But I am strongly reminded of the case of Kittleman vs. Cunningham, which was tried in San Francisco during the New Almaden controversy, and a year or two before Mr. Billings bade farewell to this State.

The case of Kittleman vs. Cunningham was tried before Judge Edward Norton and a jury in 1859 or 1860. It involved the title to the fifty-vara lot on the northeast corner of Montgomery and Bush streets, on which Platt's Hall now stands—property of great value even at that early day. Edmund Randolph was counsel for the plaintiff, and Eugene Casserly and Delos Lake for the defendant. Both parties relied on Alcalde grants. Kittleman's was the oldest, but subsequent to the issuance of his grant, the Alcalde had, for some reason, canceled Kittleman's title, by crossing it off his official books and issuing a new one to Cunningham. The case turned upon the point as to whether Kittleman had been placed in juridical possession of the lot before the cancellation of his grant by the Alcalde. It seemed to be conceded, as a legal proposition, that if he had been put into actual possession the lot was his, and the subsequent action of the Alcalde could

not deprive him of his title, and that in such case the verdict must be for the plaintiff.

A most desperate struggle of witnesses was made upon this point. Randolph, for Kittleman, placed his main reliance upon the testimony of Peter Sherreback, who was syndico of the pueblo of San Francisco at the time of the issuance of the Kittleman grant. On this point, Peter swore positively to the fact, with day, date and circumstances—that he took Kittleman to the lot, and publicly delivered seizin thereof, with all the usual ceremonies, and left him therein and thereon, in the sole and undisputed occupancy of the same. On cross-examination, spreading over more than a day, the defense was utterly unable to shake the witness in this seriously important statement. As a last and desperate resort, it was resolved to impeach the testimony by proving him to be untrustworthy, and so break him down. For this purpose, a cloud of witnesses was produced and sworn, and among them Mr. Frederick Billings, then a member of the law firm of Halleck, Peachy & Billings, a leader of the bar, as well as the very *creme de la creme* of social life. Mr. Billings was a most elegant man in his dress and deportment, and this time came to the witness stand as if just out of a handbox. He was a trifle pompous in manner, and for a self-made man, was thought by some to be a little "stuck up." Mr. Billings being duly sworn was asked the usual questions to impeach the reputation of a witness for truth and veracity.

"Do you know Peter Sherreback?" "Do you know what is his reputation among his neighbors and those who know him best, for truth?"

Answering both of these questions affirmatively, he was asked: "Is that reputation good or bad?" Mr. Billings answered that it was bad; whereupon the final question of the formula in such cases was put: "From that reputation would you believe him under oath?" He answered that he would not. Mr. Billings was then turned over to Mr. Randolph for cross-examination.

Mr. Randolph seemed especially displeased at the testimony of the witness and held him upon the rack of cross-examination for a half hour or more.

"Do you know Peter Sherreback intimately, Mr. Billings?" he asked.

"Well, somewhat," was the reply.

"Visit his house often?"

Now, it must be known that Sherreback was a poor man, and of quite a different social stratum from Billings—in fact, altogether beneath the latter from the standpoint of polite society. And the cross-examination had made but little progress before the elegant lawyer and society leader was visibly squirming out of any social intimacy with the man whose reputation he had been called on to impeach.

"Mr. Billings, have you ever dined with Sherreback?" queried his tormentor.

"Ah, no! No! Never!"

"Spent much time with the family?" "Do you go there of evenings?"

"Does Sherreback spend much time at your house?" "Ever visit you?"

"Or dine with you?"

All these interrogatories Mr. Billings answered with warm promptness.

"No." "Certainly not." "Of course not." "Of course he don't dine with me—how could he?"

"You speak, Mr. Billings, of knowledge of Mr. Sherreback's reputation among his neighbors and those who know him best. Which one of his neighbors have you been intimate with, and how intimate have you been with such neighbor?" "Do you meet Sherreback and his family often in the society which you frequent?" "What opportunities have you had of becoming intimate with him or his reputation?"

Under this style of examination Mr. Billings chafed, and explained, and qualified, until it was clearly seen that whatever the facts of Sherreback's reputation might be, Mr. Billings wanted it distinctly understood that he did not associate, and never had associated, with any such common and vulgar people as poor old Sherreback. He had never visited, dined, wine, or consorted with them, or any of them, or any such. His associates were of quite another class.

When Randolph came to sum up to the jury, he again paid his respects to Billings, and with considerable acrimony, taking the ground that the witness was prejudiced and had testified unfairly; that he, Billings, had no doubt known Sherreback in early times when they had met on terms of social equality; that Billings had grown rich and great, had got upon a higher level of society, and was ashamed of those of his old friends and associates who had been less fortunate. "You saw, gentlemen of the jury," he said, "how ready the witness Billings was to swear to his knowledge of poor old Sherreback, and to defame him. But when I sought to get at his opportunities of knowledge, he was off in a moment. He was not willing to admit that he ever associated with, or visited people, in that humble sphere of life. He denied his old friend Sherreback, and seemed to be ashamed to admit that he had ever seen, much less been intimate with, so poor a man. The wealthy and elegant gentleman of to-day would not have the fine society in which he moves to know the lowly inauguration of his magnificent career. It would never do, gentlemen; it would *never* do. He has trained himself to forget what the world doesn't know—that he was not always rich, powerful and great. Ah! gentlemen of the jury, the world is like the sea, and the people are like the fishes. The finny inhabitants of the waters are divided into grades and classes. There are fish that swim

along almost upon the very surface of the sea, and disport themselves in the sun-pierced waves, bright, joyous and happy forever. Others have harder lives and are obliged to swim in deeper and darker waters. Lower and lower down are other grades till the very bottom is sounded. Of all the fish of the ocean, the one that sinks to the greatest depths is the codfish. To reach it the fisherman will cruise far out of sight of land, and use his largest lines and heaviest weights. I have heard it said by those who have been on the banks of Newfoundland, that when one of these fish is hooked far down toward the bottom and raised to the surface, if it chances to get off the hook, it never returns to its old location at the bottom. When the tremendous pressure of hundreds of fathoms of water under which he had lived has been removed, he swells up so that he cannot get back to the lower regions to which he belongs, but is compelled to wiggle about among strangers on the upper crust of piscatorial society till he dies."

Mr. Billings did not hear the burst of laughter which followed, as he had unceremoniously left the courtroom when he saw that something unpleasant was coming.

The learned counsel opposed to Mr. Randolph—Mr. Casserly and Judge Lake—were unable to persuade the jury that their client's cause was just, and a verdict followed in favor of the plaintiff. After Mr. Randolph's death, however, a new trial was granted, and the defendant finally prevailed.

Randolph had little wit, but fullness of sarcasm. He never told a "joke." At college, whenever "one of the boys" would say a good thing, Randolph would ask, seriously, "What does *that* prove?" He once said a good thing himself, however, about a certain judge, on the bench, noted for his fluency of speech. This judge was delivering an opinion, and Randolph was impatiently waiting to commence the trial of a cause. The judge rolled out sentence after sentence and period after period with magnificent volubility, and it seemed that the end would never come. In the midst of this judicial display, Randolph turned to Tully R. Wise, and inquired, sotto voce, "Did it ever occur to you what a great man Judge—would make, if he only stuttered?"

But Randolph, it must be said, had a one-sided mind. He never took in the whole situation. Looking at him in the New Almaden case the most prominent fact is his tireless industry. Coming from the South, and being impetuous in temperament, it is a marvel that he could bestow upon any cause the patience, industry and labor which he gave to that case. He was a genius, but he was not a legal genius. He was not a powerful reasoner. He was not logical. I cherish his fame, but I am speaking the conclusion of the bar-leaders who knew him best. He was full of poetry and enthusiasm, yet at the same time, strange to say, he was a hardworking man. He won public admiration, yet he had few intimate friends. He was

not companionable. In his family, however, he was almost worshipped.

He was a man of splendid visions. He took a deep interest and an active part in General Walker's scheme for the conquest of Nicaragua. Walker was a born leader of men, but he succumbed fully to Randolph's influence. Randolph, like Bishop Whitefield, sincerely believed that no southern country could be developed without *slave* labor. He hoped to see a central empire established between the western continents, of which Walker would be the executive head, and he, Randolph, the great Chancellor. His dream came nearer fulfillment than is generally supposed. The United States did not interfere with Walker's operations, and there is hardly room to doubt that with Vanderbilt's aid the great filibuster would have won an honorable name in history. Vanderbilt had a magnificent grant from the Nicaraguan government, giving him the exclusive right to transport passengers and freight across the isthmus, and also entitling him to a large land grant on both sides of the great highway. This splendid franchise Walker, in an evil hour for himself, wrested from Vanderbilt and conferred upon the Morgans of New York city.

When Walker's last stronghold was taken, it was found that the besieging force was composed principally of white sailors ! They were in the pay of Vanderbilt !

Randolph delivered to the Society of California Pioneers, September 10, 1860, the ablest historic address ever uttered on this coast. In it he referred to the fate of his friend Walker, and also to the end of Henry A. Crabbe, who had led a filibustering party into Mexico :

Longings still unsatisfied led some to renew their adventurous career upon foreign soil. Combating for strangers, whose quarrels they espoused, they fell amid the jungles of the tropics and fatted the rank soil there with right precious blood. Or upon the sands of an accursed waste, were slaughtered by inhuman men, who lured them with promises and repaid their coming with a most cruel assassination. In the filthy purlieus of a Mexican village, swine fed upon all that murder left of honored gentlemen, until the very Indian, with a touch of pity, heaped up the sand upon the festering dead and gave slight sepulture to our lost pioneers.

An old friend of Randolph, and long one of the brightest lights at the criminal bar, thinks that Randolph would have made a great judge. If it be true that Randolph was disposed to look at only one side of a case, it is difficult to see how he could have made a great or a good judge. It seems to me that his peculiar province was that of Attorney General; his client, the State.

He was inclined, in the conduct of a cause, to seize upon something that would lead to invective. He was more powerful in invective than any other lawyer among his contemporaries. He suffered intensely from dyspepsia all his life. This gives the key to his character. He had a great deal of simplicity, and at times could be most winning among his acquaintances, as he

always was at home, yet generally his manner was repellant. In arguing a case, if there was no cause for invective, he would find an occasion. He had a fine command of language, yet was not fluent in speech. He would utter a sentence, then hesitate, as if in thought, before proceeding. At times, however, he would seem to be on fire, and pour out his words in uninterrupted flow.

In the great New Almaden case, the claimant against the government called to the witness stand His Excellency, Castillo Lanzas, a man for twenty years prominent in Mexican affairs, and who had represented Mexico at several foreign courts. Mr. Randolph embraced the idea that this man was an impostor. Accordingly, to prove his theory, he took the witness, on cross-examination, over his entire public and private life. He asked him *why* he testified in English, *how* he acquired English, where he went to school, the curriculum of his college, the offices he had held, the functions of all the departments of the government of Mexico, the names of the Presidents of Mexico and the United States for the previous ten years, etc., etc. His cross-examination of Senor Lanzas lasted *fourteen days*, during which period he put to the distinguished Mexican *six hundred and fifty-seven questions*. At last he asked the witness whom he knew in San Francisco.

The Senor replied that he was a stranger here, but he knew one *Arce*. Mr. Randolph had this Mr. Arce put on the witness stand.

"Do you know that man?" he said quite abruptly and pointing to the great Mexican.

"Yes."

"Who is he?"

"That is Senor Castillo y Lanzas, ex-Minister from Mexico to the court of St. James."

"Well, now, who are you, sir? who are *you*?" said Randolph sternly.

Personally, Mr. Randolph was a magnificent man. He stood six feet high, was "straight as an arrow," had an abundance of dark brown hair and beard, very fair complexion, a dark eye and small hands and feet. His features were as finely cut as the lines of a cameo. He died at the age of forty-two years from a disease of the stomach. Besides his widow he left two daughters, one of whom became the wife of a farmer in West Virginia.

CHAPTER XX.

Joseph G. Baldwin—Something of the Delightful Author of "Party Leaders" and "Flush Times in Alabama"—Career as Lawyer and Judge—A Great Wit and Brilliant Man of Letters—Humor Overflowing from the Bench—Contrasted With Stephen J. Field—A Bout With Tod Robinson—Skidmore's Equitable Defense—Anecdotes of Francis J. Dunn—References to S. S. Prentiss, Chapman Johnson, and Other Great Men of Older Lands, and to Judge Alexander W. Baldwin, of Nevada.

We have the testimony of that learned jurist, Stephen J. Field, and that peerless orator, S. S. Prentiss, and many others capable of wise criticism, in support of Judge Baldwin's unsurpassed brilliance as a wit and humorist, his grace and power as a writer, his ability as a lawyer, and his wisdom as a judge. When Prentiss was about to embark on his last earthly journey—from New Orleans to Natchez—he, feeling that he was passing to another life, bade his friends good-bye, and, turning to Colonel Alexander Walker, of the *Delta*, said: "Be sure to write my love to Joe Baldwin. I have written my last on earth. A great man is Joe. He has no superior as writer and lawyer. He comes the nearest to my idea of an universal genius."

Judge Field, in his autobiography spoken of in Chapter XIV, makes this allusion to his old judicial comrade: "My friendship for Baldwin commenced long before he came to the bench, and it afterward warmed into the attachment of a brother. He had a great and generous heart. There was no virtue of which he did not possess a goodly portion. He was always brimful of humor, throwing off his jokes, which sparkled without burning, like the flashes of a rocket. There was no sting in his wit. You felt as full of merriment at one of his witticisms made at your expense as when it was played upon another. Yet he was a profound lawyer, and some of his opinions are models of style and reasoning. The opinion of the Supreme Court of California in *Hart vs. Burnett* (15 Cal., 530), prepared by him, is without precedent for the exhaustive learning and research which it exhibits upon the points discussed."

Let us see what manner of man was this.

The father of Joseph G. Baldwin was a native of Connecticut, and at an early age removed to Virginia, residing first at Staunton and finally settling at Lynchburg. He was devoted to mechanical invention, possessed of great ingenuity, yet was not practical, and his labors yielded him nothing. Some of his inventions, however, were turned to account by others. The old man,

always in humble circumstances, yet lived quietly and without excitement, and attained the age of ninety years.

Joseph G. Baldwin was born at Staunton, Augusta county, Virginia, January 22, 1815. His precocity was extraordinary. When twelve years of age he was a deputy clerk of the District Court of his county. Here he received lessons in the clerical details of law practice, which were of service to him in after life. At seventeen years of age he took editorial charge of a newspaper in Buchanan, Rockbridge county. Two years later he removed to Alabama, "impelled" as he tells us in his "Flush Times," "by the gentle momentum of a lady's slipper." He does not, however, disclose who was the fair girl who disappointed him. It was—I have it from an authentic source—a Miss Menzies, who afterwards married a son of Chapman Johnson. This Chapman Johnson was the leader of the Virginia bar, and possibly the greatest lawyer of his day and generation in the civilized world, Chief Justice Marshall excepted.

While deputy clerk and editor young Baldwin had improved his leisure hours by reading law, for which he evinced a fondness at a very early age; and, having law practice in immediate view, he went to the town of De Kalb, Alabama, where he continued his law studies and impatiently awaited his opportunity for admission to the bar. At De Kalb he met S. S. Prentiss. Between the two a very cordial friendship sprang up, which proved enduring. Baldwin had met one great soul congenial to his own. Some twenty years later, on the shores of the Pacific, he came in contact with another kindred genius—John B. Felton—afterwards his son-in-law. Upon attaining his majority, Baldwin removed again—this time to Sumpter county, Alabama, where he was admitted to the bar, and where he entered upon his professional career with rare pluck and enthusiasm. He represented that county in the State legislature. In politics he was a Whig. Henry Clay was to him, so he declared in his "Party Leaders," "the greatest orator, and, except Washington, the wisest statesman and most useful citizen this country ever called into her service."

In 1844 Baldwin was nominated by the Whigs as one of their presidential electors. He "stumped" his section of the State in that campaign. In 1849 his party nominated him for Congress. He was defeated by 250 votes by Colonel S. W. Inge, who, two years later, and in advance of Baldwin, removed to San Francisco.

In Alabama Baldwin won a great reputation. He was known as a great jury lawyer. (In California he did not often appear before juries.) He had a large practice. The time which he could spare from his professional duties he devoted to literature. The product was his celebrated "Flush Times," a volume which has been the delight of two generations and which seems destined to enjoy a lasting popularity. "It was," said his

friend Howard, of Los Angeles, "the first literary essay of a mind crowded with thought and replete with exquisite imagery—the primitive yield of a rich virgin soil—the gleeful bubbling of a full, and, till then, undisturbed fountain. * * * Apart from the emanations of convulsing wit that scintillate and sparkle along each page, this work has a higher charm of pure classic diction. It contains no violation of the most rigid literary taste, or the most elevated chastity of thought, and it almost groans under its affluence of cunning fantasies of language, and merry conceits and adroit suddenness of situations."

While in Alabama, Baldwin also gave to the world his "Party Leaders," being "Sketches of Thomas Jefferson, Alexander Hamilton, Andrew Jackson, Henry Clay, and John Randolph of Roanoke, including Notices of Many Other Distinguished American Statesmen." This work and its predecessor just mentioned, have enjoyed such wide fame that it would seem idle to more than mention them. In his "Party Leaders," however, there occur passages in regard to the character of Randolph of Roanoke, which have been applied by those who knew Baldwin, to the latter himself. The quotation from this noted work, given below, was, upon Baldwin's death, reproduced by the accomplished editor of the now defunct *Sacramento Union*, "not only as a specimen of Baldwin's serious style, but on account of its partial applicability to his own intellectual traits:"

RANDOLPH OF ROANOKE.

He has had the misfortune which attaches to most men of fertile wit and brilliant powers. Men seem unwilling to accord multiplicity of gifts to any man. The same depreciating incredulity which "shook its head at Murray for a wit," and which made Elizabeth pronounce Bacon "a man of parts, but not deep in law," has denied to Randolph, because of his showy qualities, the possession of stronger and higher powers. But we think that this judgment is partial and unjust. True, he had a most extraordinary endowment of wit and the lighter graces. He was, beyond all comparison, the wittiest man of his time. He overflowed with wit. He wasted more wit than men, characteristically witty, gave out. Sheridan had not the same ease and flow of wit; the same spontaneity, aptness and raciness. Randolph's wit was much more than humor. It was a refined, wire-edged and diamond pointed common sense; a sharp and shrewd sagacity, which, while it had the edge of sarcasm, had, also, the force of argument. Randolph had the rare faculty of interpreting for the crowd; of translating in better and apter language the thoughts passing in the mind of the hearer, who was delighted to find that Randolph was only thinking his thoughts. His verbal aptness was astonishing. When anything was to be characterized by an epithet, he at once characterized it by a word or phrase so striking and pat, that it created the surprise and pleasure which are the most marked effects of wit. He had the same aptness of quotation. No man made the resources of others more subservient to his own purposes. He did not merely appropriate. He gave a new value to the quoted sentence. There was as much genius in the selection and application as in the conception and expression of the idea. His ingenuity was very great. He had the faculty of seeing remote analogies and correspondences, and of accumulating around a dry, isolated and uninviting topic a multitude of images, facts,

suggestions and illustrations. His memory was upon the same scale. It was comprehensive and retentive, taking in the whole superficies of the subject and the minutest details. His information extended to a large variety of subjects. In polite learning, especially in the standard works of English literature, he was accomplished beyond most of the literati of his country; and his taste and appreciation of the latent and patent beauties and excellences of the great classics were unsurpassed. Had he turned his attention to literature as a pursuit, it is not going too far to say that he would have enriched, not merely American literature, but the English tongue, with some of the rarest contributions made in his day by genius to letters. He mastered history with like ease. He was supposed to have a more minute and accurate knowledge of geography than any man of his country; and he even committed the book of heraldry of England to memory, and could repeat the annals of the noble houses of that kingdom in their details. But, most largely developed of all his faculties, probably, was his quick, clear and deep comprehension. His finely-toned and penetrative intellect possessed an acumen, a perspicuity which was as quick and vivid as lightning. His conclusions did not wait upon long and labored inductions. His mind, as by an instinctive insight, darted at once upon the core of the subject, and sprang, with an electric leap, upon the conclusion. He started where most reasoners end.

In concluding his essay upon Jefferson and Hamilton, Baldwin says :

There is enough of glory for them all. Honor to every hand that was raised in that holy fight! Honor to every tongue that spoke a word in season for the faith! Honor to the PEN that drew the declaration which pronounced us free! Honor to the LIPS, afire with liberty, that seconded and supported its adoption! Honor to the stainless SWORD of the boy-votary, who, side by side with Washington, through the long war, strove to make that declaration good! And honor in the highest, save to God, to the AUGUST CHIEF who was the presiding genius over camp and council; winning our freedom in the field and perpetuating it in the Cabinet!

And this of eloquence :

The highest eloquence is the demonstration of the heroic. Such eloquence is, at last, but the self-manifestation of the heroic spirit in its highest form. All heroic minds are thus eloquent, whenever the qualities that make them heroic are aroused and called into vigorous action. Eloquence is the spirit of the man in operation. When such a soul acts it is eloquent in deeds; when it speaks, it is eloquent in words. Chatham and Mirabeau, Demosthenes, Henry, Jackson, Clay, Calhoun, alone in the Senate opposing the Mexican war, and Washington when aroused, as on the field of Monmouth, possessed this eloquence in an eminent degree; and when it is called into exercise common greatness shrinks appalled and cowed before its imperial authority. It is the rarest and most infallible of the gifts and marks of greatness; for it displays in a burst of passionate energy the highest properties of man—great will, great courage, great intellect—the forces that command and subdue mankind.

Judge Baldwin married in Alabama a Miss White, by whom he had six children—four boys and two girls. He removed with his family to San Francisco in 1854. Arriving at a comparatively early day, bringing an enviable reputation as a lawyer and man of letters, and finding here a considerable number of active professional and business men from the States of his nativity and adoption, he quickly secured a good practice. He always had a predilection for politics. The old Whig party having disappeared, the

Northern Whigs becoming Republicans, and the Southern Whigs Democrats, Baldwin was no exception to the rule. He acted with the Democratic party from the time of his arrival in California until his death. In September, 1857, Hugh C. Murray, Chief Justice of the California Supreme Court, died. Peter H. Burnett, appointed by Governor Weller, acted until the next election, when Joseph G. Baldwin, who had received the Democratic nomination, was chosen by the people.

Judge Baldwin was on the bench of the California Supreme Court from October 2, 1858, to January 1, 1862. On leaving the bench he resumed law practice in San Francisco. Two years later he visited the East—the war then raging—and endeavored to procure a pass to go through the Union lines to see his aged father. He failed in this, and returned to this State without having seen the old gentleman, from whom he had parted nearly thirty years previously. After his return from the East, Judge Baldwin passed his time in San Francisco and Virginia City, following his profession in both places. These were “flush times,” and, like most eminent lawyers who were here at that date, he reaped a golden harvest. His oldest son, Alexander W. Baldwin, was then a leading lawyer of Virginia City. The precocity inherited by the latter, and his extraordinary success at the bar, were fittingly mentioned by Judge E. W. McKinstry, from the bench, November 17, 1869. A. W. Baldwin was killed in that month by a railroad accident, in Alameda county, California. Although but twenty-eight years of age, he was then Judge of the United States District Court for the State of Nevada. Judge McKinstry, then County Judge of San Francisco, upon adjourning his court out of regard for the memory of this young jurist, remarked as follows:

As we approach the evening of life, we become accustomed to seeing those who began the day with us grow weary and drop out of the line of march. But when a man who commenced his career long after most of us, and yet who lived long enough to take an active and prominent part in the contest of life, is called away, we are startled and rudely awakened as from a dream, and learn that the worldly life we are pursuing, and with which, from habit, we have become so familiar is not unending. And when we see the victim of a catastrophe like that which has occurred so young, who has attained that wealth and honor which is supposed ordinarily to be the reward of half a century of labor, we become more impressed with the lesson, and more impressed, too, when death comes in so unexpected a guise. The applications of modern science and the useful arts are intended to add to and increase the comforts and luxuries of peace. Yet when carrying death so suddenly, so unexpectedly, they become more effectually destructive than the most terrible weapons of war. Judge Alexander W. Baldwin commenced his career at an age when most members of the profession commenced them as undergraduates in our universities. And I recollect very well it was the proud privilege of his father—the distinguished gentleman who presided over the Supreme Court of this State—to hear from the lips of his son, then a lad of eighteen years, an argument which, for clearness of statement, logical arrangement and attractive eloquence, perhaps was never surpassed in his subsequent life by the gentleman just deceased.

At a very early day he went over to Nevada, and was there associated with Senator Stewart in the practice of his profession. In 1854 he was chosen one of the Presidential Electors in that State. In 1865 he was made United States District Judge for the State of Nevada at an age which I believe is unprecedented, unless, perhaps, in the case of Judge Hoffman, who was also appointed at an unusually early age.

Now, it seems to me particularly fitting and appropriate when a man as distinguished as the late Judge Baldwin, is called away from our midst, that the members of the bar should unite in that testimonial of respect for his memory, which they are accustomed to render in honor of the memory of the distinguished and illustrious members of the profession to which we all belong.

Judge Baldwin had three other sons, all of whom were unusually gifted, exhibiting at an early age quickness and originality, and remarkable facility with the pen. All died in the dawn of manhood. A strange fatality seemed to wait upon the family for some years. Between 1873 and 1877 occurred the deaths of the elder Baldwin, his eldest son, Judge A. W., his three other sons, Joseph G., Jr., John W., and Sidney, and his lamented son-in-law, John B. Felton. The widow and two daughters, one the widow of Felton, survive.

Judge Baldwin's distinguishing faculty as a lawyer was his logical power. He was a strong man as a reasoner. In argument he spoke the words of truth and soberness, and in a matchless manner. His facility of illustration challenged admiration. In this, his perennial wit and humor were always serving him. In reply he was masterly. The *reductio ad absurdum* was his forte. Rarely in California, but many times in Alabama, he displayed his powers before a jury. He would often compress a whole case in an epigram, or would throw off a sentence that would illuminate a principle. Rapid in thought, clear in vision, he comprehended a case at first glance. Understanding it, he made others understand it by his illustration. And who could step into a law library and find so many authorities on a given point and digest them and apply them so quickly as he?

The great defect in his oratory was his voice. It was not agreeable and was not under control. He was S. S. Prentiss, without that marvelous voice. His sentences were rounded, pointed, polished, smooth-flowing, his wit more than abundant, his memory excellent, his information wide; in conversation he was irresistible—but on the platform he could not *talk* like Prentiss or Baker. Who could? Given a mellifluous voice, Baldwin would have made a great popular forensic orator. He had all the qualities but one. Before a court, no crowd present, speaking to legal questions, his manner was good and his voice was not noticed. With a *voice* that could *thrill*, he would have been a man of the masses—lacking it, his empire was chancery, and his unconquerable weapon was the pen.

Baldwin's fame as a jurist will rest chiefly upon his opinion in *Hart vs. Burnett*, before mentioned. I have quoted Judge Field to show the learning and research which that opinion exhibits.

Baldwin's opinions cover several volumes of the California Reports. Sometimes overruling prior decisions, they remain themselves unquestionable. They partake much of the quality of his style as a writer, and are consequently sprightly and vigorous. His unfailing fountain of humor bubbled over even on the bench. Off the bench it was characteristic and universal. His jests, anecdotes and stories still pass current among the bar, retaining the full force of their original interest.

The annals of the law have developed a great deal calculated to excite merriment, and Judge Baldwin, although he was a profound lawyer, yet did his full share towards investing this stern science with the light mantle of mirth.

The case of Knowles vs. Inches, reported in the twelfth volume of California Reports, page 213, was an action in equity to restrain the defendants from prosecuting certain suits in San Francisco courts, and from leasing and conveying certain real estate in dispute. The plaintiff based his prayer for equitable relief upon the allegation that there had been a long course of vexatious litigation between the parties, resulting in judgment for plaintiff, but that the defendant threatened to prosecute further actions against the plaintiff to harass and annoy the latter. The plaintiff's prayer was denied and he appealed. In deciding the cause in the Supreme Court, Judge Baldwin said.

We must reprehend the practice, which is too common, of stuffing a transcript with irrelevant and unnecessary matter. The present case affords a remarkable illustration. The transcript contains some 233 pages, when everything essential to a review of the case might easily have been given in fifty. Besides the delays, unnecessary expense and labor thus created, the points are hid in this superfluous matter, and it frequently becomes more difficult to find out what they are than to decide them when found. The Practice act, so far from sanctioning any such course of proceeding, by implication rebukes it. Instead of copying into a statement for a new trial, or on an appeal, deeds and transcripts of records, when no point is made on the construction of the language, a brief statement of the instrument answers every purpose. * * *

This case was referred to a referee, who, in his report, gives the history of the litigation, which, for variety and extent is unexampled, considering the small value involved. This history, indeed, might afford an illustrative appendix to Scott's account of the celebrated suit of Peter Peebles vs. Plainstaines, or Dickens' report of the case of Jarndyce vs. Jarndyce. Indeed, it would appear that the only use to which the parties designed to put this lot was to make it the foundation of a lawsuit, which they have erected upon it; an edifice divided from cellar to garret into all manner of secret chambers, involved passages and dark entries. The real parties to the controversy seem to have been too few in number to keep up the strife, and hence both sides have called in a relay of fresh partisans to figure in the fight, having impressed them by means of sham deeds and fraudulent conveyances. Perjury is charged, with no lack of nervous expressions, upon the respective sides, and the lower arts of forensic warfare, such as snap judgment and partial statements of facts, as we are informed by counsel, give character and variety to the proceeding. Ten solid pages of transcript paper, closely written, are taken up by the able gentleman, who acted as referee, in giving a mere analysis of the leading facts of these fierce forensic conflicts; the whole narrative of

which, unabridged, exceeds by a few pages Sir Walter Scott's account of Napoleon's first campaign in Italy. Fearing, probably, that the litigation might, in some way, be brought to an untimely close in the lifetime of the litigants, the respondents are accused, with some reason, of adopting the economical plan of dividing out the subject into small parcels and suing for this lot by *inches*.

We cannot take time to review this protracted controversy, and to follow its mazes through all its ramifications; nor is it necessary, for a single point is conclusive. We regret that we have no power to put a stop to this comprehensive and embarrassing litigation, and that we must turn a deaf ear to the pathetic appeal of the appellant's counsel, "not to suffer his clients to be lawed to death;" but, though it is the interest of the republic that there should be an end of litigation, and not less the interest of these parties, yet the rules of law forbid our putting an end to it this way.

Judgment was affirmed on the ground that chancery could not interfere in the controversy, until after a trial at law, adjudicating the title—to which trial all claimants must be parties.

In his opinion in the case of the City of Oakland vs. Carpentier (13 Cal., 550), in referring to the charter of the *town* of Oakland (which is to be found in the laws of 1852, page 180), Judge Baldwin said: "The charter is, perhaps, the most defective on the statute book, and this is saying a great deal. A perverse ingenuity seems to have been exercised to make it as lame and loose as possible. The joint labors of Malaprop and Partington could scarcely have made such a collocation or dislocation of words and sentences. Among other things, it gives the Board of Trustees power "*to license and suppress* dramshops, horse-racing, gambling houses, houses of ill-fame, and *all indecent and immoral practices, shows and amusements.*"

Further on, quoting from the charter, the Judge styled it "a jumble of incoherent and contradictory verbiage."

This Judge made an apt observation regarding the celebrated case of Archy, the negro slave, who was brought into this State by his master, Charles A. Stovall, of Mississippi, in October, 1857. The slave deserted his master, and was brought before the Supreme Court on habeas corpus, the writ being sued out by Stovall. The Supreme Court—Baldwin was not yet on that bench—decided that Stovall was not entitled to the black man either by constitutional right or on the grounds of comity between the States, because Stovall was neither a traveler nor visitor, he having remained in this State an unusual time, having engaged in business here, and having even hired out his slave. "But," said Judge Burnett, "there are circumstances connected with this particular case that may exempt him (Stovall) from the operation of the rules we have laid down." These circumstances were comprised wholly in the fact that this was the first case of the kind that had come before the court. It was a case of "I'll let you do it this time, but look out hereafter." The slave was delivered to his master. The opinion in this case is the most remarkable to be found in the reports. Judge Baldwin said of it: "It gives the law to the North, and the nigger to the South."

A certain lawyer once told Judge Baldwin a clever joke upon a brother attorney named Balder. He thought it was particularly good and that it would apply to Judge Baldwin as well as Balder, but for the fact that the names were dissimilar.

"Don't let that annoy you a minute," said Baldwin, "I will get my name changed by an act of the legislature."

Baldwin proposed at one time to write sketches of this Bar. How admirably he would have executed the task!

Francis J. Dunn was in early times a leader of the Northern California bar. He was a brother of a distinguished Illinois judge. A vain, eccentric, dissipated, cross, petulant man was he, rude towards his brother practitioners, and when a judge decided a case against him, he became insolent to the bench. Niles Searls, now Chief Justice of our Supreme Court, when County Judge of Nevada county, had the temerity to decide a cause against Dunn, and the latter appealed to the Supreme Court. In his brief Dunn was particularly caustic upon the County Judge. In delivering the opinion of the Supreme Court Baldwin rebuked Dunn severely for the language of his brief. A few weeks later Baldwin and Dunn met in Nevada City.

"Baldwin," said Dunn, "I think you were unnecessarily severe upon me in your decision the other day."

"Do you think it was decent," asked Baldwin, "to reflect as you did upon the integrity of a judge?"

"What did I say?" asked Dunn.

"You said this," said Baldwin, repeating an expression of Dunn's in his brief.

"Did I?" asked Dunn.

"Yes, and you put this in," said Baldwin, giving another impolite quotation.

"Is that so?" inquired Dunn.

"Yes," said Baldwin, "and you put this in," giving another quotation.

"Well," said Dunn, drawing in a long breath, "I must have been drunk!"

"But you didn't put *that* in," said Baldwin.

Just here I recall one of the many good things that are told about Dunn.

He was found by some miners once, in midwinter, lying by the roadside between two mountain towns, covered with snow, unconscious and almost frozen to death. Being lifted up, rubbed and brought to his senses, he was asked: "Who are you?"

"I am Francis J. Dunn," he promptly replied, with his returning breath, "the best mining lawyer in the State of California."

It was very funny to see Judge Field, his associate on the Supreme Bench, turn upon Baldwin his severe countenance at times. Judge Field, who bore himself with great solemnity, betrayed constant uneasiness lest his witty and brilliant brother should break out into some overt impropriety of sport. And Baldwin would enjoy the sufferings of the Chief Justice all the more.

On one occasion the eccentric and crude Skidmore, of Marin county, was arguing a case. He was himself appellant and had been sued in ejectment. Skidmore had interposed an "equitable defence" as he designated it, which was that the land in dispute was, in point of fact, no part of the patented Mexican grant, as alleged by respondent, but that the government surveyor had corruptly run his lines so as to embrace the land in controversy, which was in the occupation of the appellant; and it was charged in the "equitable defense" that the surveyor was paid \$1200.00 for this fraudulent survey. In the midst of Skidmore's argument, Judge Baldwin stopped him, and in an attitude of earnest inquiry said: "Let me see if I understand you. You say that the land in controversy never belonged to the respondent and is no part of his original Mexican grant?" "Yes, sir." "And that the surveyor deliberately ran his lines wrongly so as to include this land?" "Yes, sir," said Skidmore. "And that respondent paid the surveyor \$1200 for doing this?" "Yes, sir," said the counsel. "Then," continued Baldwin, maintaining his serious air, "Why didn't you pay him \$1300 to leave your land out." Skidmore incautiously answered, "I didn't have the money, your honor." "Ah!" then said Baldwin, "there was no lack of diligence on your part."

The loud laughter that followed was quickly checked by the frown of the Chief Justice.

Baldwin was once badly disturbed by Tod Robinson, father of C. P. Robinson, and once District Judge at Sacramento, and, later, Supreme Court Reporter. Robinson, when he would warm up, was a fine talker. This occasion was also in the Supreme Court, when Baldwin was on the bench. A certain constable given a writ of execution against the property of a defendant in a suit, levied on and sold property belonging to a man who was no party to the suit. The latter sued for damages, and instead of suing the constable alone, made the sureties on his official bond co-defendants also. He recovered damages in the District Court against all the defendants and the latter appealed. Robinson appeared in the Supreme Court to uphold the judgment obtained in the District Court. Baldwin interrupted his argument to inquire if the counsel had ever considered the distinction between acts done *virtute officii*, and acts done *colore officii*. "It seems to me," he observed, "there would be as much propriety in joining the constable's

bondsmen with him, in a suit against him for damages for assault; as much propriety as joining them in this action."

With great deliberation, Robinson responded: "Your Honor has announced a principle that I have been contending for all my life." At this there was eager attention to hear more. Robinson proceeded on the correctness of the position stated by Baldwin, arguing against himself, and then, suddenly, and with impressiveness in his voice and gesture, he said: "But, Your Honor, there is just one trouble *we* have—there are just 400 adjudicated cases against us and *not one* in our favor."

Baldwin was cut, but Robinson went on and made further argument in support of the principle stated from the bench, but soon he repeated: "But, your Honor, there is just one trouble we have. There are just 400 decisions against us, and not a single one in our favor." He argued for some time further, during which he gave the quoted words frequent iteration. At last Baldwin, interrupting, said, "Well now, Judge Robinson, if you will just repeat that 400 times, we'll be even on the authorities."

Judge Baldwin was kind in his wit—remarkably so—but he could resent insolence in fitting terms. He was a most amiable man, but nobody was rude to him twice.

The Hon. Edward Stanly married his sister. When Stanly was running for Governor, he made the usual stumping tour, and one of the burdens of his speech was that he never sought office, but that he had always been importuned to *take* office, much to his annoyance. In an opposition paper, Baldwin drew a graphic picture of Stanly being chased out of three States and several Territories by people who wanted to run him for office. Baldwin signed this article "Jack Cade."

For several years before his death he lived with his son-in-law Felton, at the latter's residence in Oakland. Unlike Felton, Baldwin cared nothing for the pleasures of the table, except the post-prandial talk. He hardly knew what plates were placed before him. But when the cloth was cleared he was all youth and jollity. It was a genuine treat to sit at the table with Baldwin and Felton. Either one was perennial in wit and in that lore which entertains and charms.

Baldwin died at the age of forty-nine years. He had been for some time engaged in gathering materials for a history of California, but had not progressed far with his manuscript. He was unusually lively at the dinner table the day before his death. That evening in the midst of animated conversation, he suddenly put both hands to his cheeks and said: "My jaws pain me—they feel stiff." He had recently undergone a surgical operation and thought he had passed it triumphantly. But he had the lockjaw. The next day he was silent forever.

CHAPTER XXI.

Davis S. Terry of Stockton—A Life Cast Amid Stirring Scenes—In the Texan Army Under Sam Houston—At Monterey Under Taylor—Chief Justice of the Supreme Court—Arrest and Imprisonment by the Great Vigilance Committee—The Duel With United States Senator, David C. Broderick—Graphic Narrative of the Historic Encounter By an Eye-Witness—In the Confederate Army—A Command Under Maximilian in Mexico Declined—References to D. W. Perley, J. Neely Johnson, Henry Edgerton, Volney E. Howard, R. P. Hammond, Samuel H. Brooks, Calhoun Benham, Thomas Hayes, Joseph C. McKibben, David D. Colton and Leonidas Haskell.

Whoso attempts to follow this remarkable man through the tempest-vexed voyage of his life will be cast oftentimes between Scylla and Charybdis; and may esteem himself fortunate if he escape the perils of the pursuit. With a purpose to close the ear to the voices of prejudice and passion, and to do exact justice alike to the living and the dead, he may yet set his sail with trepidation.

David Smith Terry was born in Todd county, Kentucky, March 8, 1823. His ancestors migrated many generations ago from Ireland and Scotland to the State of Virginia. One of the family, Nat. Terry, was a famous Colonel in the American revolutionary army. He was taken prisoner by the British, and suffered a long and cruel imprisonment in Charleston. Being exchanged, he participated in many important engagements, and at the siege of Yorktown. David Smith, Judge Terry's maternal grandfather, after whom he was named, was also a revolutionary hero. He refused to release his father's brother, to whom he was strongly bound by ties of affection, and whom he had taken prisoner at King Mountain.

Our friend's father was a cotton planter in Kentucky, and afterward in Mississippi. Removing to Texas before the acquisition of that vast empire by the United States, he died there, immediately after his arrival, in 1835. The widow died a year later.

The following glimpse of David S. Terry's boyhood days is caught from a letter penned to his wife in a painful crisis many years ago. It was published in the *Sun* of July 2, 1856, and the occasion will appear hereafter:

"By the death of my mother, I was left, at the age of thirteen years, to my own guardianship, my only counselor, who had influence with me, being my brother, who was but two years older than myself. From that age I counted myself a man, and associated with men—aye, and played a man's part in the struggle which secured the independence of Texas.

Acknowledging no control upon my actions, I could not sink from the soldier into the schoolboy; so, what education I have acquired—above what a boy of twelve years gathers at common schools—I acquired by reading at home all the books I owned or could borrow, during the time I was not engaged on the frontier."

The adventurous youth served in the Texan army under Sam Houston, taking part in the battle of San Jacinto. When Texan independence had been achieved, he commenced the study of law at Houston, and was there admitted to the bar. When war opened between the United States and Mexico, he was among the first to enlist; he was with Taylor "at Monterey, where we won the day."

In 1849 he led a company of Texans across the plains to California, having, en route, two fights with Indians, who killed only one of his men, and who were made to deeply lament having formed his acquaintance. His first pursuit in California was mining in Calaveras county; this he followed for a few months only, and, before the *annus mirabilis* had passed into history, he was in active law practice at Stockton, where, after the lapse of thirty-eight years, he may be found to-day! But the interim—how vast!

In 1850 he was defeated for Mayor of Stockton by Samuel Purdy, who afterwards became Lieutenant-Governor. In the same year he formed a law partnership with D. W. Perley, which continued until 1855. In the fall of the latter year he was elected, on the Native American ticket, a Justice of the Supreme Court for the short term—four years—Hon. Hugh C. Murray being elected at the same time, by the same party, Supreme Court Justice for the long term—six years. He took his seat on the Supreme Bench in January, 1856. His decisions are reported in volumes five to fourteen, inclusive, of the California Reports. They are terse, logical and generally sound. A strong state's rights opinion of his will be found in the ninth volume—Warner vs. the Steamer Uncle Sam. On the death of Chief Justice Murray, which occurred on September 18, 1857, Judge Terry became Chief Justice.

An extraordinary adventure marked the first year of his judicial tenure. It was the year of the great Vigilance Committee. He was an open foe to that organization, and believed it should be suppressed by the military power of the State and nation. Governor J. Neely Johnson, by proclamation, declared the city of San Francisco in a state of insurrection, but was overwhelmed by the force of adverse public opinion all through the State. His applications to General Wool and to President Pierce for federal military aid to disperse the Committee were denied. Some state arms had been shipped from Sacramento on a schooner to be used by state troops in San Francisco, but a party of Vigilantes, under J. L. Durkee (he still lives) seized the vessel in the strait between San Pablo and San Francisco bays. The Committee, in

investigating the matter of this shipment of arms, desired to take the evidence of one Reuben Maloney who was believed to know all about it, and who, being a strong enemy of the Committee, refused to attend and testify. It was determined to take him by force, and S. A. Hopkins, Vigilance Sergeant, and two men, were ordered to that duty. They found Maloney in a room with Judge Terry and a friend. The Judge told them that they should not make the arrest in his presence. Hopkins withdrew with his men, and procured reinforcements. Returning in quest of Maloney, he met him on the street, proceeding to the State Armory, accompanied by Judge Terry and friends, armed with guns. The arrest being resisted, Hopkins seized Judge Terry's gun, and the Judge instantly stabbed him in the neck, inflicting a terrible wound. The Judge was promptly overpowered, disarmed, and was incarcerated in "Fort Gunnybags." He was held a close prisoner for seven weeks, and, after undergoing a long trial, during which he took down himself the evidence of witnesses, he was released, owing to the recovery of Hopkins and the prospect of an early voluntary disbandment of the Committee.

I have it from a citizen who was prominent in the councils of the Committee, that Judge Terry's life hung upon that of Hopkins. Some urged his execution without regard to Hopkins' fate, and, strange to say, among these radicals was one who has been in responsible official station in this city for a great part of the time since that exciting juncture.

It was during this imprisonment that Judge Terry wrote to his wife the letter from which an extract has been given, and from which I desire now to make a further quotation :

If I felt guilty of any crime I would not falter, but upon this point I am invulnerable. I know that I acted not from any feeling of malice towards any human being, but solely from a regard to a sacred principle—from the desire to prevent the consummation, in my presence, of an act which, though it may have been attempted from good motives, and would certainly have worked no injury to the community, as the man sought to be removed was a bad man—was, nevertheless, a violation of the constitution of this State, which I had sworn to support, as well as the constitution of the United States, to secure the blessings of which to their posterity both of my grandfathers fought and bled, and toiled and suffered.

I was educated to believe that it is the duty of every American to support the constitution of this country; to regard it as a sacred instrument, not to be violated in the least provision; and, if necessary, to die in its defense. The meanest criminal is, under that provision, guaranteed the same rights as the noblest citizen, and cannot, without a violation of its provisions, be deprived of his liberty except by legal process. It was at this holy principle, and the obligations of my oath, I looked, and not at the demerits of the man—whom I know to be a bad man; and I believe even those who are my selfconstituted judges will do me the justice to think I would not defend that man for his own sake.

While Judge Terry was in confinement, the Texas Legislature adopted a memorial to Congress asking that body to interfere in his behalf. Hon. M. H. McAllister, Judge of the United States Circuit Court refused to issue a writ of habeas corpus for the prisoner, being "unwilling to provoke the animosity of the people."

The California Democracy, which up to the year 1859 had always been violently disturbed by faction, in that year split absolutely in two. David C. Broderick led the Douglas or anti-Lecompton wing, while David S. Terry was a warm supporter of the administration of President Buchanan. On the 24th of June, 1859, in a political speech before the Administration State Convention at Sacramento, Judge Terry, then Chief Justice of the Supreme Court, alluded to the opposing wing of the party as "a miserable remnant of a faction sailing under false colors, trying to obtain votes under false pretences." "They have no distinction," he proceeded; "they are entitled to none. They are the followers of one man—the personal chattels of a single individual whom they are ashamed of. They belong, body and soul, to David C. Broderick. They are yet ashamed to acknowledge their master, and are calling themselves, forsooth, Douglas Democrats," etc.

The words quoted gave offense to Broderick, who, when he read them the next morning at the breakfast table of his hotel in San Francisco, remarked that he "had considered and spoken of Judge Terry as the only honest man on the Supreme bench, but he took it back." This was said in angry tones addressed to a friend sitting by him, but was heard by D. W. Perley, Judge Terry's former law partner, who was at the table, and who, after informing Broderick that he would call him to account for the words used, left the room. The same day Perley sent a hostile note to the Senator, who replied, somewhat oddly, that "he could not, *at the present time*, afford to descend to a violation of the constitution and the state laws." He said further, "If compelled to accept a challenge, it could only be with a gentleman holding a position equally elevated and responsible; and there are no circumstances which could induce me even to do this during the pendency of the present canvass."

On the day after the election, Judge Terry resigned his seat on the Supreme bench, repaired to San Francisco, and sent a note to Broderick, demanding a retraction of the words given above. Broderick asked that he set forth the language objected to. This was done. Broderick then wrote the words as he remembered them, but substantially as he had been reported, made no retraction, and added that Judge Terry could decide whether the language was offensive. Judge Terry thereupon sent through Colonel Calhoun Benham, a promptory call to the "field of honor." It was accepted, the duel was fought, Broderick was mortally wounded at the first fire and died three

days later, and his death opened a mighty gulf of hate between Northern and Southern men in California.

Judge T. H. Rearden, in a sketch of Broderick, written for my book, "Representative Men," 1870, observed: "The train of events which seemed to make the death of the Senator the irresistible necessity of the tragedy, pointed to Dr. Gwin rather than to Judge Terry, as his veritable opponent. It was not on the same plane with Terry that Broderick's acts were projected. The offense rankling between them was an episode rather than the absorbing emotion, and the frightful unities of the drama would seem to have been better met, had Gwin rather than Terry pointed the pistol that finished the career of our hero."

As twenty-eight years have elapsed since the famous duel occurred, and as our State numbers among its population many thousands of intelligent young people, even voters, who were not then born, it will be appropriate to give an account of the meeting, and I can do no better than use that which appeared in a city paper at the time, a graphic and dispassionate statement by an enlightened and sharp sighted eyewitness. It will follow this sketch.

In the narrative it is denied that Judge Terry made a loud remark as Broderick fell. It was widely reported that he said: "The shot is not mortal; I have struck two inches too far to the right." A remark was also by somebody gratuitously put on Broderick's dying lips, universally believed and circulated all over the country—this: "They have killed me because I was opposed to the extension of slavery and a corrupt administration." Our historian, Hittell, declares that the fallen man said nothing of the kind.

In 1862, Judge Terry went to the Southern States, passing through Mexico, and joined the Confederate army. After serving awhile on the staff of Gen. Bragg, he organized a regiment in Texas, which he commanded in several battles. At the close of the war he commanded a brigade, a separate command. He was rigid in discipline, and severely punished raiding. An officer sent to inspect the condition of the troops in his department eulogized Terry's discipline. A brother of Judge Terry's, Colonel Terry, of the Texas Rangers, was killed at Green river.

When the war closed he went to Mexico. Maximilian offered him a high military command, which he declined, and devoted himself to cotton raising for two years, but with no success. Then, in 1869, he returned to California. After a short stay at White Pine, Nevada, he settled down, in 1870, in his old town, Stockton, where he has since continuously resided.

He was a member of the last Constitutional Convention, serving as chairman of the Committee on the Legislative Department, and as a member of the Committee on Judiciary. He was author of the clause declaring the responsibility of bank directors to depositors. He took the stump in support of the new constitution; declined a nomination for Supreme Judge on the

ticket of the New Constitution party. He was a candidate for presidential elector on the Democratic ticket in 1880, and was the only nominee on that ticket defeated, the vote being close, and he falling behind, owing, it is supposed, to his name being scratched by old friends of Broderick. He asks for nothing, but freely contributes time and money to his party.

He has generally been fully occupied with professional duties, and has now a large practice in the counties of San Joaquin, Merced, Stanislaus, Fresno, Tulare and Kern. He was employed in all the extensive litigation affecting water rights in Fresno and Tulare. He is the principal counsel for the defense in capital cases through the six counties named. The case of young Granice, convicted of murder in the second degree, in killing Madden, in Merced county, will be remembered. Madden was editor of the *Express*. Granice was twice convicted and was in the State Prison, under a sentence of thirty years, when Judge Terry secured his freedom on a technicality. The prisoner was indicted for manslaughter, and being convicted, the Supreme Court granted him a new trial. Again placed upon trial on the same indictment, and the evidence being all in, the District Attorney, in conformity to the Code, moved that the jury be discharged and the prisoner remanded, to await indictment for a higher crime, the testimony going to show that the charge should be murder. This was done. The prisoner was afterwards indicted for murder, and was convicted of murder in the second degree, and sentenced as stated. The Supreme Court held that the discharge of the jury was equivalent to an acquittal.

The prominent lines of Judge Terry's character are unmistakable and well known to a broad acquaintance. He has great aggressiveness and undaunted firmness of purpose. He never quails, even before a raking fire. A man of strong friendships, it quite naturally follows that he has also strong prejudices; but he is easily placated, and in the path of mercy a little child could lead him. He is generous. His nephew and partner, who was long an inmate of his home, and who has given me a glimpse of his private life, speaks of him in terms of tenderness. His political foe, Henry Edgerton, stated to me his belief that it would be an impossibility for David S. Terry to do an act of dishonor. His charities have been many but never ostentatious; in this respect his left hand has not known what his right hand has done. He is very impressive and effective before juries, but in his addresses in the courtroom, as elsewhere, as, also in conversation, he never attempts ornament, but rather disdains it. His speech is plain, but uttered with the force of frankness, the eloquence of a chaste simplicity, and the precision that is the birthright of a masculine intellect. False pride, shuffling and cant he opposes with the full impulse and momentum of his nature. He is of giant physical stature. Standing six feet three inches in height, with Atlantean shoulders and sinews, a weight of 225 pounds, finely

preserved, and looking ten years younger than his real years, Nature seems to stand up and point to him, "and say to all the world, *This is a man!*"

The Judge married, in 1852, Miss Cornelia Runnels, a niece of Hiram Runnels, an early Governor of Mississippi, who was a warm adherent of Andrew Jackson. (Runnels once fought a duel with Volney E. Howard, who afterwards became a resident of Los Angeles. General Howard's life was saved by a buckle on his suspender, which turned his adversary's bullet.)

The lady just named was one of the most remarkable women this country has produced. Her fortitude in the face of inconstant fortune often evoked the applause of her husband's foes. Circumstances making it impracticable for her to accompany him when he drew his sword for the "lost cause," she followed on a steamer to San Blas, and thence pushed on overland through Mexico to Texas. Twice on the way she was robbed by bandits, but each time the robbers were apprehended by Mexican officers, and her property was restored to her. On the journey her infant babe died, and she carried it for two days on horseback before she found a spot to give it Christian sepulture. She joined her husband in Texas, and, with the exception of this brief separation, was his constant companion through all the vicissitudes of his eventful life, until her death a few years ago.

A son of our subject, who had attained considerable reputation at the bar, died at Stockton, April 1, 1885, while still a young man. He had been a member of the legislature, District Attorney of his county, and Grand Chancellor of the Knights of Pythias.

On January 7, 1886, at Stockton, Judge Terry married again, the lady being the plaintiff in the celebrated case of Sharon vs. Sharon, in which he had been her counsel. She had won her case in the Superior Court, and it was pending on appeal, but Mr. Sharon had died on November 13, 1885.

I now give the narrative alluded to, of the great duel. A few sentences of explanation, in parentheses, are my own:

THE BRODERICK-TERRY DUEL.

SAN FRANCISCO, Sept. 14, 1859.

MR. EDITOR: I accept the medium (kindly offered) which your columns afford, to place on record a clear, comprehensible and unadorned statement of the late unfortunate "meeting" between the Hon. David C. Broderick and Chief Justice Terry. I will premise that I was on the ground as a spectator. I knew nothing of the preliminaries, and was so ignorant in this respect, that up to the moment the adversaries took position on the field I was unaware of the distance determined upon, and was impressed that the principals were to *wheel and fire*. With this exordium I presume your readers will perfectly understand that my statement is one of fact, given under the conviction that I am performing a high and solemn duty.

At six o'clock (on the morning of September 13, 1859), a large party of gentlemen

in buggies and other conveyance, arrived near Mr. Davis' ranch, about one mile and a half to the south of the southernmost extremity of Lake Merced. At this point, all having indefinite notions of the place of meeting, they were met by a carriage returning, containing two partisans of Mr. Terry, who seemed to have been searching unsuccessfully for the rendezvous, and to have given it up. The whole procession was about to return to town, when Dr. Hammond (Dr. William Hammond) in a gig, was seen to approach in the direction in which we had come. Knowing that the doctor was one of Mr. Terry's physicians, we felt satisfied that the place of meeting could not be far distant. We determined to follow the doctor, and therefore all wheeled conveyances. The doctor hesitated when he saw that he was acting as *cicerone* for a procession of duel-ground hunters, and I descended from my wagon to approach him, under the misapprehension that the doctor was Major Hammond, former Collector of the Port, (now, and ever since A. D. 1878, President of the San Francisco Board of Police Commissioners). The close resemblance of the brothers will make this *faux pas* excusable. In order to pass off the mistake with a flourish, I approached the retiring parties and made some seasonable inquiry. The malignant feeling of some men against Mr. Broderick can be imagined, when, during the conversation, one of the two occupants of the coach expressed a wish that he would be carried from the field a corpse. Of course, so diabolical a hope, given in uncouth terms, could only emanate from a source lost to all virtuous feeling or manly consideration.

The doctor proceeded, and the crowd followed. In a few minutes we arrived at Davis' ranch, where our leader stopped. The whole procession hitched up their animals, and I approached the bluff ranchero, who was feeding his cattle, in order to gain some information.

In answer to my inquiries, he said that no carriages had passed his house during the morning except the one we had overhauled. At this moment a very curious conversation took place between Mr. Davis—who was dressed in a cotton blouse and equipped with a large sized pitchfork—and an individual who had evidently driven all night in search of the field.

"Have you any whiskey in your house?" inquired the newcomer.

"I have not," answered the ranchero.

"It might be serviceable on this occasion," said the other.

"Whiskey is only serviceable or of use on proper occasions; this is not one, and therefore, if I had it, I would not produce it."

About this time several vehicles came flying through the pass, and stopped at a place some distance beyond where we were. I soon became satisfied that these men were the important ones of the occasion. Mr. McKibben, (Joseph C. McKibben, ex-Member of Congress—see page 15) ex-Sheriff Colton, (David D. Colton, father-in-law of Mr. Crittenden Thornton, and since deceased), Senator Broderick and one or two personal friends descended from their vehicles. Judge Terry, who was accompanied by Calhoun Benham and Colonel Thomas Hayes, of San Francisco, as seconds, S. H. Brooks, State Controller-elect, as field counselor (now United States Treasurer at San Francisco) and Dr. Aylette as surgeon and general adviser—for the doctor is said to be a most experienced duelist—thereupon arrived, and all jumped from their conveyances.

The field, the entrance to which is a few hundred yards south of Davis' house, was entered through a gap between two hills. A fence had to be jumped before reaching the grounds. The dell where the duel was fought was surrounded by hills and undulating ground. Egress can be had from it—as far as I noticed—only by two level outlets, viz: through the opening leading to Davis' ranch, and directly south from the ground itself, up a gulch. How far this gulch runs I know not, but it appears to me to connect with

a ravine encircling the easternmost hill, forming the amphitheater where the tragedy was enacted.

Immediately upon the arrival of both principals and their seconds, which was almost instantaneous, Mr. Broderick proceeded up the gap and occupied his side of the field. Mr. Terry and his friends did the same. The armorer, with the cases of pistols, took position at the northern point of a triangle formed by Broderick on the east, Terry on the west and the armorer on the north. The empocketed plain in which the affair occurred permitted of about sufficient level ground for the requirements of the occasion.

When all hands arrived on the ground, I counted (not a particular count) seventy one men, including principals, present. Mr. Terry's seconds and advisers were constantly with him. I noticed particularly that when Benham and Aylette were attending to "outside" matters, Brooks kept close to his friend, and conversed with him in a lively tone. On the other hand, Mr. Broderick seemed to be absorbed with matters disconnected with the issue, and was talking earnestly with Mr. Haskell, (Leonidas Haskell, a wool dealer, and politician of influence, in whose dwelling at Black Point, Broderick died), and a gentleman whose name I am unacquainted with. During this time Mr. Broderick was cool and selfpossessed. His antagonist seemed agitated, and measured the ground in his direction with an uneasy and anxious tread. The seconds approached the armorer, examined the weapons, turned several times, and pointed to the white marks that had been placed on the field to establish the distances. Mr. McKibben, in examining the pistols, snapped a cap, with an air of satisfaction. He seemed to look as if the pistol suited him. Some conversation was had. Mr. Benham (or Aylette, I am not certain which) approached Terry, said something to him, in reply to which Terry seemed to smile, and became more calm than before. As the affair was approaching the crisis, every eye was turned on the combatants.

Mr. Broderick's friends held a short and earnest conversation, and retired. Mr. Brooks did the same with Mr. Terry, and moved to one side. An official expression notified the combatants to take their respective positions. The distance was marked white, and appeared to an observer murderously close. In fact, more than one man present uttered the ejaculation that it was downright murder to allow men to shoot at each other at so short a distance. The principals, however, took their positions. Mr. Broderick divested himself first of a dark brown paletot, and cast his eye along the ground separating him from Mr. Terry.

At this moment I took pains to closely scan the countenances of both combatants. Mr. Terry's lips were compressed, his countenance darkly sallow, and his whole appearance betrayed that of a man without fear, as well as without religious constraint. Wan and attenuated, he stood a stolid monument on the field of strife. Mr. Broderick could not have been distinguished by the stranger as a principal. With his hands folded behind him he held earnest conversation with Mr. Haskell. He would occasionally turn, scan the crowd and rest his eye upon some recognized countenance. The muscles of his face were strong, and his visage unrelaxed in every particular. His lips, when not conversing, were compressed, and his whole bearing was that of a man who was about to meet a great issue, and who was firmly prepared for it.

Having digressed somewhat, in order to give my readers a full account of what occurred, I return to the principals and their seconds at the point where I left them.

Messrs. Broderick and Terry, being divested of their overcoats, were told by Mr. Benham to take their positions. The seconds then arranged about the weapons—how this was done is unknown to others—and Mr. Benham, taking a pistol, proceeded to Judge Terry, and placed it in his hand. The latter took the pistol in his left hand, passed it behind him, connected both hands, stood for a moment in that position, and

then rested his weapon on his left hand in front. Mr. Broderick, on being handed his pistol, anxiously examined it, and at intervals measured with his eye the ground between himself and his adversary. He seemed to take much pains in examining the pistol. At length he braced himself up and took his position. A frock coat which he wore seemed to trouble him somewhat, and he endeavored more than once to bring the front tails closer together. Had a pin been offered him at this moment, I believe he would have used it. Terry, in the meantime, with the barrel of his weapon resting on his left arm, held his eyes fixed on the figure of his antagonist. Before the word was given, Mr. Benham approached Senator Broderick, who had handed his watch, money, etc., to Mr. McKibben, and felt his clothes, and examined with his hands the body of the principal. A nod of satisfaction showed that he had found nothing concealed beneath his vestments. Mr. McKibben then went towards Judge Terry. The latter handed to his second, Mr. Benham, a watch, pocket articles and a quantity of money. Mr. Benham received the watch, but the money, with a flourish, he scattered over the ground. Mr. McKibben then examined the person of Judge Terry, expressed himself satisfied, and took position to the right of Mr. Broderick, and immediately opposite Mr. Colton. The seconds of Judge Terry occupied similar positions, with Mr. Benham on a line with Mr. McKibben, and Mr. Hayes on a line with Mr. Colton—all the parties forming a sexangle.

The parties thus placed were left for about five seconds; Mr. Broderick, in the meantime, as before stated, examining his weapon. Mr. Benham produced a number of papers and read from one the conditions of the duel. The word fell to Mr. Colton, Broderick's second. He advised the parties, with an example, how he should call it. He said: "Gentlemen, I will give the word as follows: Gentlemen, are you ready? When both have answered ready, I will say, fire, one, two, with a pause between each word." Mr. Benham, for the benefit of his principal, repeated the word. The arrangement seemed to be perfectly understood, and all parties assumed their positions; Mr. McKibben uncovering his head.

We have before said that Mr. Broderick seemed to know the importance of the issue, and seemed nerved to meet it. Up to the time the pistol was handed him he appeared the cooler and more collected of the two. But after examining the pistol he seemed to become uneasy. He betrayed nothing like lack of courage; but in measuring the stock of his pistol with the conformation of his hand, he presented to the observer an unsatisfied appearance. This was shown by more than one movement. His right leg—the fore one—sank below a bracing attitude, seeming as if he was fighting on downhill ground. It was the general expression of all within my hearing that Mr. Broderick's position, either from his constitutional nervousness, or from a want of confidence in the equality of the chances between the two combatants, was unfavorable to his success. All agreed that his personal bravery was patent. There was no weakening; but there was an anxious solicitude in his deportment that placed him at great disadvantage.

At precisely fifteen minutes to seven o'clock, as the sun was endeavoring to force his smiling beams through a succession of clouds that were passing south over the head of Mr. Broderick—the solemn moment on which all were satisfied a life depended—Mr. Benham gave a rapid glance to the sky, detected something to the disadvantage of his principal, and approached the latter, who wore a large, rather stiff-brimmed wool hat, and had drawn the front of it over his eyes. After Judge Terry's second had caught his eye, the front was turned up. Mr. Colton then, in a clear and distinct voice, called out the word. He made considerable pause between each announcement—a pause that can be compared to the time elapsing between the strokes of the cathedral clock bell, perhaps not so great.

When Mr. Colton asked, "Gentlemen are you ready?" Mr. Terry instantly replied

'Ready,' without moving or relaxing a muscle. Mr. Broderick, however, as I said before, spent several seconds in examining the stock of his pistol, which did not seem to fit his hand. When, at length, he answered "Ready," he did so with a gesture, nodding his head and inclining his body towards Mr. Colton. Between the words "Fire!—one! two," both parties shot. Mr. Broderick fired first, and at about the last enunciation required to convey the word "one." Mr. Terry shot in a space of time afterwards which it would require in music for a quaver. The word "two" was scarcely started upon when the Judge fired. Mr. Broderick's shot was spent in the ground some four or five yards in advance of him. Judge Terry's took effect in Broderick's right breast, above the nipple.

Immediately upon receiving his antagonist's fire, Mr. Broderick raised his right arm still grasping the pistol. It was the impression that he had been shot in the shoulder. His arm was contracted, and he made a spasmodic effort to brace himself up. The leaden messenger, however, had gone to a more sensitive and vital spot. After endeavoring to summon the will to resist the pressure that was bearing him down, the head dropped in a recumbent position over the right shoulder, the knees bent outwardly, and at length, gently and calmly as a child retiring to rest, he eased to the earth, pressing his right breast with the hand still holding the pistol, and lying on his left side.

Judge Terry, in the meantime, maintained his position, keeping his eye constantly in the direction of the fallen man. In a few moments he was told that his antagonist could not rise, and he thereupon left the field. It has been said he made a loud remark when Broderick fell. He did not. Whatever he said to his second was not heard by the spectators.

I now close this extended and detailed account. I give it as a statement of facts, in the order in which I saw them, hoping that I might thereby correct erroneous impressions, and give all an opportunity of judging, from the events that occurred.

CHAPTER XXII.

Elisha W. McKinstry, D. M. Delmas and Others—Judge McKinstry's Long Period on the Supreme Bench—An Estimate of Him as a Judge, By Henry H. Reid.—The Splendid Career of Mr. Delmas—Notices of William J. Shaw, Henry H. Reid, Lansing B. Mizner, George R. B. Hayes, William M. Pierson, T. C. Van Ness, Judge James V. Coffey, Joseph W. Winans, Hon. William M. Stewart, T. E. K. Cormac, August Comte, Joseph M. Nougues, John Garber, Harry I. Thornton, Thomas B. Bishop, John C. Hall, Arthur Rodgers and Eugene N. Deuprey—A Story of Horace W. Carpentier.

It is a commanding name that crowns this final chapter, and there are judicious observers who will say it is a case of putting the first last. Be it so or not, it is only chance that has reserved ultimate place to so eminent a man, and to one or two of those whose names will follow close upon his. Not surer in his grasp of legal principles than Field, or Baldwin, or Murray, (the Bar probably places him next to these) he yet fills a larger place in our judicial history. His period on the Supreme bench has been continuous since January, 1874, and has now about doubled that of any other man. His has been the voice of the Court in the adjudication of the greatest causes, those which have involved the largest pecuniary interests, and those which have enlisted the passions of the people, notable among which are the local option case of 1874, the Kearney habeas corpus of 1878, and the water rights case of 1886. So, by reason of length of service and enduring work, ELISHA W. MCKINSTRY has made a name that will probably live longest of all thus far inscribed on the shining roll of our Judiciary.

This gentleman was a District Judge in 1852! It was in the district, under our first system, comprising Solano and contiguous counties. Before that, being a California pioneer, he was in our first legislature, representing Sacramento in the lower branch, P. B. Cornwall being one of his eight colleagues. By the next succeeding legislature he was elected Adjutant General at the age of 24 years, Thomas B. Van Buren nominating him in the Senate and Jesse D. Carr in the Assembly. He left this office to go on the bench. At the end of his term as District Judge he was re-elected, in September, 1858. He went to Washoe in the flush times, and in 1864, he and John R. McConnell and W. C. Wallace (not W. T.) were the Democratic nominees for Supreme Justices of the State of Nevada, all being defeated. Returning to California, and locating at San Francisco, he was, in October, 1867, elected by the Democracy, County Judge for a term of four years from January 1,

1868. In October, 1869, he was elected Judge of the Twelfth District Court, as an Independent candidate, over the regular Democratic nominee, R. R. Provines. In 1873, again as an Independent candidate, he was elected a Justice of the Supreme Court, over Samuel B. McKee, Democrat, and Samuel H. Dwinelle, Republican. On September 3, 1879, under the new constitution, which, among many other things, re-organized the Supreme Court, he was re-elected a Justice of that tribunal, and under the classification by lot, which the constitution directed, he and Hon. J. D. Thornton drew the longest terms, eleven years each.

Judge McKinstry was born in Detroit, Michigan, and is, in 1888, sixty-two years of age. The following estimate of him as a judge, I drew from a lawyer admirably qualified to speak on the subject, Mr. Henry H. Reid of San Francisco:

I consider Judge McKinstry one of the best judges that have sat in our Supreme Court—and I do not forget Field or Baldwin in saying this. He possesses a wide and exact knowledge of the law—its history and its great principles. In addition to his familiarity with legal rules and precedents, he has the tact and instincts of the scholar. Hence, the aptness of his illustrations, drawn from his store of historical information and literary acquirement. In the consideration of a case presenting important and difficult questions of law, enveloped in a mass of complicated and confused statements of facts, he brings to his task a mind capable of grasping it as a whole, of resolving it into its essential elements, of stating the real questions presented and demanding to be decided, and then applying the true legal principles to their elucidation. He has a keen perception of the ludicrous,—loves a good joke even on the bench, if it be timely and apt. At the same time he appreciates the necessity for preserving dignity and decorum in judicial proceedings. Satire is a weapon of which he is master. Instance, his opinion in *Houghton vs. Austin*, 47 Cal., (pp. 669-71) denying the petition for rehearing filed by Creed Haymond. (Read in the light of Haymond's subsequent history, the opinion becomes doubly interesting). His statement of the law and his reasoning throughout, in *Ex Parte Kearney*, which excited much angry comment at the time (even from some who ought to have known better, *e. g.* Delos Lake) I regard as wholly admirable.

In *Ex Parte Wall*, 48 Cal., 279, the great local option case of 1874, is a most able exposition of the law, as to when a legislative enactment shall be deemed void, as attempting to delegate legislative power, or as valid because merely postponing the time of its taking effect, that is, to the happening of a contemplated event. In the one case, the legislature has decided upon the expediency of the law for itself; in the other, it attempts to delegate the power and shift the responsibility to others.

In the *People vs. Hibernia Savings and Loan Society*, his opinion is a model of clear statement, and his conclusions are as unanswerable as a mathematical demonstration.

Of his opinion in the great case of *Lux vs. Haggin*, the questions involved in it being of the most vital importance, and argued by some of the ablest lawyers of the State, two or three times over it is praise enough of its learning and the powers of perspicuous statement and lucid exposition which it displays, to say that it is worthy of a place beside Judge Baldwin's famous opinion in *Hart vs. Burnett*, 15 Cal., 607. In the petition for rehearing filed by Garber, Thornton and Bishop, in *Lux vs. Haggin*, (after the second decision of the Court being delivered by McKinstry), it is said:

"The elaborate and exhaustive opinion of Mr. Justice McKinstry, concurred in by the majority of the court, whether it shall stand as the final judgment in the cause or not, certainly constitutes a contribution of inestimable value to the discussion of the important questions involved in the controversy. It is the most elaborate presentation of the arguments in favor of the prevalence of the common law doctrine of riparian rights in California which has yet been made, or which will probably ever be made.'

Senator Matt. H. Carpenter, who stood in the front rank of lawyers of national reputation, and who knew whereof he spake, said of the judicial opinions of Chief Justice Gibson, of Pennsylvania, that to read and thoroughly understand them, would make of the student a profound lawyer. So, we may say, that he who reads and masters the opinions of Justice McKinstry, will acquire a knowledge of the law of the State of California as it exists to-day, and of the history of its growth and development, which is now unfortunately too seldom possessed by the members of our bar.

I turn from a great magistrate to a great advocate.

D. M. DELMAS was born in France, of French parents, April 14, 1844.

It is pleasant to state his nativity and ancestry, because our old ally has been very chary in her contributions to the American bar, contrasting strikingly, in this respect, with her neighbor across the channel. In Mr. Delmas, born in the land of Aguesseau, is presented a revival of that great advocate. He is a giant in every department of legal practice. His father, Antoine Delmas, came to California in 1849, settling in San Jose, where he still lives. The son, who had arrived in the latter part of the year 1854, entered, four years later, Santa Clara College, an institution which is among the best treasures of the State, and in which many of our most honored citizens have been educated. Mr. Delmas graduated in 1863, receiving the degree of Master of Arts, with the highest honors of the college. He graduated from the Law Department of Yale College in 1865, and in September of that year was admitted to the bar of the Supreme Court of Connecticut, returning shortly thereafter to San Jose. In February, 1866, he was admitted to the Supreme Court bar in this State, and, in May of that year, opened an office in San Jose with Hon. B. D. Murphy, who has since been Mayor of San Jose and State Senator from Santa Clara county. The partnership, though the realization of a boyhood dream, formed during the college life of these two gentlemen while in Santa Clara, was little more than a nominal association. Mr. Murphy, being possessed of an independent fortune, never entered upon the discharge of the active duties of a lawyer. Of these early days at the bar Mr. Delmas thus expressed himself to a friend some years ago:

"When I commenced the practice of the law my path was by no means strewn with roses. From my father I had received a pretty fair education, and I determined that the tax upon him should cease when I entered upon the practice of my profession. I left home, in May, 1866, with just two double eagles in my purse, and in my heart the determination that thenceforth I would be dependent upon none but my own resources. That resolution I have adhered to, but it would be idle to deny that I did so at the cost of many hours and days of suffering. Too young, inexperienced and unknown to command a retainer in important cases; too proud (a foolish pride, perhaps) to commence with the

gratuitous defense of paltry criminals, I was soon brought to the end of my scanty store of money and to the melancholy contemplation of a bottom of a purse unreplenished by the fruit of my labors. To keep from actual want, I taught school for six months in the winter of 1866. In 1867, a committee of citizens invited me to deliver the address on the Fourth of July. With this invitation came the dawn of better days. The address was delivered. It was warmly applauded. It secured me, a few days afterwards, the nomination for the office of District Attorney at the hands of the Democratic County Convention. I was elected. The office, in those days, was a very lucrative one; besides, it brought me in contact, in one way or another, with nearly every man of mark in the county. From that time on, I certainly have had no right to complain of the frowns of our great mistress, the Law."

No lawyer in this State possesses broader knowledge or is a greater master of his profession than he. As an advocate he is the admiration of the bar itself. His remarkably clear vision, his subtle intellect, his piercing judgment, his power of statement, have been applauded by the veterans of the profession. Before a jury he is argumentative or pathetic, as the occasion demands. Unlike some other advocates of brilliant parts, he keeps in mind the fact that "the jury are sworn to make a *true* deliverance, and to address their passions alone is equivalent to asking them to violate their oaths." Mr. Delmas is very painstaking in the preparation of causes and very skillful in their management—assiduous, tenacious. He has great capacity for applying himself to his subject. In the matter of evidence, his method is noticeable. His system is to make himself, before the case is answered "ready," accurately, mathematically if possible, master of all the facts of the controversy, and, especially, of those which are favorable to his adversary. Upon the trial, he takes full notes of everything that is said or done. It is an article of faith with him to state evidence to the jury with absolute accuracy; and he almost invariably prefaces this argument with a courteous invitation to his adversary not to hesitate to interrupt and correct him in case he should inadvertently fall into an error. It is certainly noteworthy, that, although English is an acquired tongue, and he was a perfect stranger to it for the first ten years of his life, he speaks it better than any other lawyer in the State. Judge Archer of San Jose, having said to me that the eloquent Edgerton, whenever he had an opportunity to hear Mr. Delmas argue a case, would always embrace it, just to listen to this great advocate's elegant and exact diction, I afterwards received confirmation of this statement from Mr. Edgerton in person.

Mr. Delmas has long been a regent of the University of California. He was President of the Day on the occasion of the inauguration of Hon. Horace Davis as President of the University, March 23, 1888, and delivered the address of welcome.

Mr. Delmas is a son-in-law of Col. Joseph P. Hoge. He removed to San Francisco in 1882, taking his large law library with him, the most

valuable in the State, excepting two or three already possessed in that city.

In addition to extended professional fame, an ample fortune has rewarded his industrious and honorable life. He owns among other possessions a fine residence in the town of Santa Clara, surrounded with attractive grounds, and a noble building in San Jose named Paul Block in honor of one of his sons.

I am about to rest from my work. Others would have done it better, but they, too, must have left it incomplete. The theme is expansive. BENNETT and CASSERLY, COOK and YALE, CADWALADER and MCDUGALL, COFFROTH and LATHAM, SANDERSON and MCCONNELL, what a chain of brilliants their names present! They are all gone, while HOFFMAN and CURREY, and WALLACE are still achieving! Every name tells of a history that has invested our bar annals with exceeding interest.

It is a lengthening roll. JOSEPH W. WINANS! The death of this leader on March 31, 1887, closed an unbroken career, at the bar of this State, of thirty-seven years. Coming to California in 1849, from New York City, (where he was born July 18, 1820) he established himself at Sacramento. There his plastic hand did much to shape the local government in its various departments. In association with John G. Hyer (Winans & Hyer) he held the principal law practice which centered at the capital before the great flood. Removing to San Francisco in 1862, he formed the law partnership with D. P. Belknap which continued uninterruptedly to his death.

His life, remarkable for usefulness and honor, and eminently successful from all points of view, was full of profit to others, its deep, broad and fertilizing current rolling like some "exulting and abounding river, making its waves a blessing as they flow."

In him the judicious patron and critic of art, and the well-informed man of letters, genial in his companionship, and delightful in his conversation, stood forth commandingly; yet were they comprehended in the larger stature of the lawyer, who loved his profession first and held it as a great, continuous trust. The soaring soul was controlled by a purpose true.

There is WILLIAM J. SHAW, a most interesting man, with a most interesting history. He has been so long in voluntary retirement that his very name is unknown, perhaps, to more than a few of the army of young men who have passed from the Hastings Law College to the practice of the profession which Mr. Shaw so signally adorned. An allusion of mine to him as belonging to the bar of California drew from him the statement that "he had not taken a fee, nor offered to, in the last twenty-six or seven years." This was in October, 1886. "It is only, perhaps," he continued, "on the doctrine of *semel abbas, semper abbas*, that I may be classed as a member of the bar of California."

Mr. Shaw is a California pioneer, a bachelor, and has been in the enjoyment of a large fortune as long as any one can remember.

He is a square man, sensible and charitable, and well thought of by all who know him. He was a Democratic State Senator from San Francisco, away back in 1856 and 1857, when they had annual sessions and two-year terms; and again in the biennial sessions of 1867-'68 and 1869-'70. In the legislature he always had important chairmanships, was remarkably industrious, and his work was wise.

He voted for Gwin and Broderick when the two rivals were elected United States Senators in 1857. A few days after that unlooked for consummation, the senate was compelled to adjourn for a day or two on account of a majority of its members repairing to San Francisco to attend receptions of the elect, but Mr. Shaw was one of those who remained at his post. He was author of the resolutions passed at the great anti-bulkhead mass meeting in San Francisco, in 1860.

Mr. Shaw is a deep thinker, possesses broad culture and has traveled extensively abroad. Now and then he used to give his reflections to the people in a speech or lecture. His latest public appearance, I believe, was as the Orator of the Day, at the annual celebration of the Pioneers, in 1876.

There is HENRY H. REID, born at Babylon, N. Y., March 14, 1845, a farmer's son, of Scotch-English lineage. He graduated from Columbia College Law School in 1868. After a short practice in New York City, he removed, in the fall of 1871, to Norfolk, Virginia, where he soon won a firm place in the esteem of the people and secured a valuable clientage. He quickly stepped into the front rank of the Norfolk bar, while, apart from the profession, his scholarship and address made him the soul of literary and social circles. It was in 1873 that he commenced practice at the San Francisco bar, and he has since followed it there continuously.

Mr. Reid has the impulses and intuition of the true lawyer. His perception is fine, his grasp of mind broad and firm, and his analysis thorough. An unassuming gentleman, he yet has great professional pride, which is closely related to his high sense of personal honor and his superior legal attainments. It is the pride of the master. His examination of a difficult law question leads inevitably to its elucidation. His memory is true, he has remarkable power of statement and illustration, and rare perspicacity; is persistent in inquiry, and confused heaps of facts unfold into system and harmony before his searching and patient survey. Albeit his temperament is one of reserve, his breadth of knowledge and his poise of judgment have challenged the attention of the bench and of the profession generally.

A mere lawyer is only half a man, says high authority. Mr. Reid is not a lawyer merely. His mind has many sides. He has a rich fund of general knowledge. Since early boyhood he has been a great reader and close

student. His conversation shows his familiarity with the best writers of every era, revealing, also, the well-informed man—wise in thought, full of happy suggestion, and of ever-present wit.

"Reading maketh a full man," said Bacon ; "conference a ready man, and writing an exact man. Histories make men wise; poets, witty; the mathematics, subtle ; natural philosophy, deep ; morals, grave ; logic and rhetoric, able to contend." In Mr. Reid these effects all stand out prominently, yet he never airs his learning. To the mediocre and commonplace he is indulgent. He will even let a driveler button-hole him, and in learned company where he is *primus inter pares*, he wears with exceptional modesty the honors which come to him at "the feast of reason and the flow of soul."

Mr. Reid indulged his literary taste to a limited extent in New York and Norfolk, contributing to the columns of leading journals ; but in California, while still pursuing a wide range of reading, he has seldom turned his pen to themes other than the law. However in my book, "California Anthology," [1880,] are selections from his writings here, one being a tribute to the versatile genius of Oliver Wendell Holmes.

In person Mr. Reid is of large and compact build, and of striking personal appearance. As his mental stature is imposing, so he is a strong man physically, and while of gentle disposition and temperate habits, is full of grit and stands by his convictions.

Mr. Reid is a man of family, and lives in the City of Alameda. I referred to this beautiful city as being a town, in the notice of ex-Judge Waymire. It developed into a city after I commenced the writing of these chapters.

There is JAMES V. COFFEY, the admirable JUDGE, who comprehends within himself nearly all the qualities that go to make up that solemn yet beautiful character. Having impressed his mind on the legislation of the State, while the head of the San Francisco delegation in the Assembly, he has since so crowned the bench with honor as to establish this as his peculiar station. "Friend, go up higher !" is the general voice. I ask the reader to look back to page 196, and read a brief quotation from remarks on Judge Shafter by Rev. Mr. Stebbins. That the description fits Judge Coffey, too, especially the last fifteen words, can be testified to by a great cloud of witnesses. And this Judge seems to learn by heart every one with whom he is called to deal, possessing so deep an insight into human character that he might be called the Professor Fowler of the bench, although he does not need such close contact as the latter exacts with his human subjects.

Nearly all of Judge Coffey's period on the bench has been passed in the Probate department of the Superior Court of San Francisco. A large volume of his probate decisions has just been published, reported by Timothy J. Lyons and Edmund Tauszky. The Judge is a bachelor, a native of New York City, came to California in 1852, and is now 41 years of age.

GEORGE R. B. HAYES, whose masterly conduct of the plaintiff's case in *Colton vs. Stanford, et al.*, 1884-85, won the admiration of the entire bar, is a native of Belfast, Ireland, and was born May 22, 1847. He was educated at Chichester Academy in that city, and came to California in August 1863; admitted to practice in our Supreme Court April 5, 1869; and has been engaged in a general practice ever since, excepting a period of three years during which he was absent from the State. He was a member of the Assembly from San Francisco at the session of 1869-'70, when he was a member of the judiciary committee and chairman of the committee on military affairs. He was one of the Fifteen Freeholders elected on November 2, 1886, and who framed a new charter for San Francisco, which instrument was rejected at the polls. For some years past he has been one of the most active and prosperous practitioners at the San Francisco bar. He has long been associated in business with John A. Stanly, once County Judge of San Francisco, and Thos. B. Stoney, once County Judge of Napa. He qualified himself for the bar in the law office of his uncle, the late William Hayes.

The transition seems natural, from Mr. Hayes to his bosom friend, Mr. WILLIAM M. PIERSON. When, a good while ago now, the attorneys of all the San Francisco banks united in a written opinion that the Bank Commissioners of the State were not vested with power to examine such banks as came strictly in the commercial class, Mr. Pierson led them into a discovery of their error. See the case of *Wells, Fargo & Co. vs. E. J. Coleman, et. al.* 53 Cal., 416, in which Mr. Pierson appeared for the State in the place and at the instance of the Attorney-General. Mr. Pierson was born at Cincinnati, Ohio, on February 3, 1842, and is a lineal descendant of Aneke Jans, the Trinity church [N. Y.] grantor. He arrived in California on Independence Day, 1852, studied law in the offices of Nathaniel Bennett, Annis Merrill and Henry H. Haight; was admitted to practice in April, 1862, after examination, and at the age of twenty years, under a special act of the legislature authorizing it, and practiced in partnership with Mr. Haight until the latter became Governor of the State in December, 1867. He was a State Senator from San Francisco, 1875-1878. He introduced a bill limiting the grounds of divorce to adultery only, which was not passed. Another bill of his to compel newspaper proprietors to retract false and defamatory articles, passed the Senate by 25 to 10, on March 13, 1876, Donovan, Edgerton, Haymond, Hilborn, Laine, Rogers and Shirley being among those voting aye, and Bartlett, Howe and Roach among the noes. This bill was indefinitely postponed in the Assembly, on the recommendation of the judiciary committee, John R. McConnell, chairman. Mr. Pierson has been very successful in the practice and enjoys a considerable fortune, his own accumulation.

✓ JOHN GARBER, HARRY I. THORNTON, and THOMAS B. BISHOP, born respectively in Virginia, Alabama, and Massachusetts, will have large attention from me if I ever come back to my present theme. These gentlemen have been associated together in law practice ever since A. D. 1880. They are all of one political faith, and their political foe, John Currey, who has been Chief Justice of our Supreme Court, regards this law firm as the strongest in the State. My notes show that Judge Currey so expressed himself to me on January 16, 1883. Well, the firm certainly has not lost strength since then.

CAPTAIN T. E. K. CORMAC of San Francisco, is another whose rare good fortune in practice has known no retiring ebb since its first flow in 1880. The Captain was born in the British Isles, and is the attorney for the British Consulate in San Francisco. He was a cadet in the Naval Academy near Trieste, and afterwards served for some years in the Austro-Hungarian army, as a lieutenant. He was admitted to the bar in Boston, Massachusetts, and practiced there a few years before removing to California. For four years—1883-1887—he was one of the attorneys of the Public Administrator of San Francisco, Hon. P. A. Roach. He owns a fine home in Sausalito, and valuable timber lands in Mendocino County. The Captain is a bachelor, a cultured, traveled man, and as judicious a critic and as liberal a patron of art as was the late Joseph W. Winans. His age is 44 years.

MR. JOHN C. HALL and MR. ARTHUR RODGERS compose a San Francisco law firm that has had an exceptionally large and lucrative practice ever since it was formed. Mr. Rodgers was the first graduate of the University of California, to become a regent of that flourishing institution of learning. He was legal adviser of the late Governor Washington Bartlett, and is one of the executors of the latter's will. He was born in Tennessee in August, 1848, and came to California in 1864.

Mr. Hall was born in Wisconsin, Feb. 2, 1847, was admitted to the bar of the Supreme Court of Minnesota, in March, 1867, and came to California in October, 1871. Before settling in San Francisco, he passed a year in Plumas County. I have this incident of his brief practice there: It occurred on a trial in a Justice's Court in Indian Valley, Plumas County, before a jury composed mainly of Germans, of little education. The opposing counsel had thought proper to air his learning and had treated his illiterate hearers to much Latin. Mr. Hall, replying, rolled off sentence after sentence in German, using that tongue exclusively. His adversary stopped him and appealed to the statute which prescribed that court proceedings should be conducted in English. Mr. Hall changed his speech to English, with the excuse that the other attorney had seen fit to speak in a dead tongue, and should not object to being answered in a live one. His object was attained—the jury took the side of the tongue they understood.

Some of the lawyers who in boyhood, before 1860, attended the Sacramento High School, will also furnish most interesting subjects for notice in the by-and-by. A few are named on page 93. WILLIAM S. WOOD is of this number. He was a strong and eloquent debater even then and his success in life was generally predicted. He acquired a fortune at the bar in Virginia City, Nevada, and has had a large practice in San Francisco since 1879.

AUGUSTE COMTE, after representing Sacramento in the Assembly and in the Senate, turned away from the law and followed merchandizing for several years. But he long ago returned to the profession, and ever since has had a large practice. He is a graduate of Harvard.

JOSEPH M. NOUGUES, who was City Attorney of San Francisco in 1870-71, has since continuously maintained a lucrative law business; in addition to which, he has of late years been occupied in the development of a gold mine owned by him in El Dorado County. This mine was, from 1851 to 1855, the joint property of Mr. Nougues' father and brother, and Col. E. D. Baker. Mr. Nougues himself became the owner and resumed its development after work had been suspended for some thirty years. It is yielding largely of the precious metal.

Mr. T. C. VAN NESS, who has taken a very prominent place at our bar, and who leads all others in the line of insurance cases, inherited like McAllister, a name distinguished in bar annals. His father was an early time Mayor of San Francisco, and his grandfather was Governor and Chief Justice of Vermont, and U. S. Minister to Spain. Mr. Van Ness himself was born in New Orleans, La., in 1847, came to San Francisco in 1855, (his father having arrived in 1850), and is a graduate of the Santa Clara College. His course of reading for the bar was pursued privately at home, as outlined for him by Judge James D. Thornton. He has practiced continuously since his admission to the bar of the Supreme Court, in July, 1879. While he has had peculiar and unbroken success in insurance cases, his practice is general, except that he avoids criminal business. A sister of Mr. Van Ness is the wife of Hon. Frank McCoppin.

EUGENE N. DEUPREY, who has long been an active practitioner at the San Francisco bar and who has won great reputation in the conduct of criminal cases and contests in probate, displays equal ability in all other branches of practice. Few, if any of our bar leaders possess a more vigorous intellect than this gentleman, and we have no more effective speaker, either in Court or before the masses. Mr. Deuprey constantly exhibits an exceptional delight in the profession, especially in the trial of hard-fought causes. He is one of the youngest of our bar leaders, having been born in Louisiana in 1850.

LANSING B. MIZNER, of Benicia, is, I believe, the oldest member of the bar in the State north of San Francisco, and has been in general practice since 1850. On the rejection of the Mexican grant to the Soscol rancho, the people of Benicia were left without title to their lands and houses. Mr. Mizner at once set about correcting the trouble and prepared a bill which passed Congress, donating all the land in the town to the parties in possession. As State Senator he also secured the necessary legislation to enforce the national laws, and took several cases which arose on the construction of those laws to the Supreme Court, and was successful in all of them. He has been connected with all the more important litigation arising in Solano and Contra Costa counties for twenty years past. In 1866 he was admitted to the bar of the United States Supreme Court.

Mr. Mizner was born in Illinois, Dec. 5, 1825; was educated at Shurtleff College at Alton, in that State; passed four years, 1839-1843, in New Granada, being attached to the American legation; and served through the Mexican war as a soldier in the American army. He is a California pioneer. Standing over six feet high, of large, sinewy and symmetrical frame, of striking countenance and looking a decade younger than his real years, he is personally one of the most imposing figures at the California bar. His continuous success and the high standing he has maintained in one community for a generation, testify amply to his great strength and ability as a lawyer, and his excellence as a man. He has a large fortune, of which a good part lies in San Francisco, to which city he repairs every few days.

HON. WILLIAM M. STEWART, United States Senator from the State of Nevada, was, during two considerable and widely separated periods, a prominent member of the California bar—in the early years, in the northern mines, and latterly in San Francisco. He has displayed remarkable and unbroken vigor of both body and mind, through a long and active career. He was born in New York in 1827, graduated from Yale College in 1849, and in that year came to California. Reserving him, also, for future notice, I will only tell this story of him now, which I had many years ago from his brother-in-law, Hon. W. W. Foote:

Dr. Samuel Merritt, of Oakland, having law business in Virginia City, went there and retained Mr. Stewart. He was stating his case, when he was asked if he had a witness to some alleged fact. He answered "Yes." Proceeding further, he was again asked if he had a witness to prove something else. Saying yes, he resumed, and making another statement, Mr. Stewart a third time inquired "Have you got a witness to prove that?" He answered: "No." "*Then go right out and get one!*" said the lawyer.

I want to end with another story, and the following looks up smiling from a mass of like material on my table. They tell it on Horace W.

Carpentier, one of our oldest and richest lawyers. To appreciate it, one must know that Mr. Carpentier is a large landowner and has been a party to many suits involving the title to extensive tracts of territory.

A settler in a southern county of California who obtained a government patent, said he was not yet satisfied, but would *perfect his title*. Coming to San Francisco he called on Mr. Carpentier and offered him \$100 for his deed of the same land. "I don't own it," said Carpentier, "I have no land in that county." "But you *may* have a claim to it some day," said the settler, "and I am willing to pay you \$100 for your bargain and sale deed now." Carpentier took the money and executed the desired conveyance. "Thank you," said the settler, "now I *am* safe."

Another? Very well.

Richard H. Daly, of Mariposa, (he had been an alcalde, and they called him Judge), was an eccentric and erratic but most interesting character—one of those anomalous souls whose amusing aptitudes enliven the annals of our early bar. He once defended a man charged with stealing a horse, and he aimed at proving an alibi. A certain man, who was not above suspicion, testified strongly against the prisoner. Daly determined to "break him down," if possible. On cross-examining the witness, he asked:

You are a vaquero? Answer—Yes.

A native Californian? Yes.

Very fond of riding mustangs? Yes.

Sleep in the saddle? Yes.

Throw the lasso? Yes.

Wear spurs? Yes.

Smoke cigarettes? Yes.

Blow the smoke through your nose? Yes.

Stand aside, said Daly; *you'd* steal a horse anytime.

And the witness stood aside.

Of course Judge Daly cleared his man. Such stories are not told unless they speak also of happy results.

CHAPTER XXIII.

James W. Coffroth—"Tuolumne's Favorite Son"—A Young Journalist in Pennsylvania—Leaves the Tripod for the Bar in California—His Early Loves—Matilda Heron and Alexandra Fisher—Connection with the Sole Trader Act, the First Recognition of Women by the State—In the State Legislature—Career in Politics—Marriage, Death, and Burial—An Interesting Character—His Great Political Mistake—Some Amusing Scenes and Anecdotes.

It was in 1872 we laid him in his grave. Even now it is hard to realize that his voice is hushed. Arriving here in the first year of his manhood, passing through many strange vicissitudes, he learned the hollowness of fame, and had not long been settled down to serious and fruitful work, when, just in the cradle of his higher life, came the "fell sergeant, strict in his

THE CHAPTERS BEGINNING WITH THIS PAGE
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praised the funeral sermon, and at the grave uttered up a prayer, then, observing Mr. Coffroth in the assemblage, he said: "I see present the Hon. Mr. Coffroth. He was, I am told, a schoolmate of Judge Carnly. Perhaps he would like to say a few words of his departed friend before the earth closes over his body."

Mr. Coffroth stepped forward, and commenced in a subdued tone, to speak. Fervency, pathos, sorrow, tenderness, emotion, eloquence rolled from his trembling lips. Soon the women were all weeping, and the men, including Mr. Hamilton, covered their eyes with their handkerchiefs. One who was present, says, "I had to move away; I couldn't stand it."

In due time, Mr. Coffroth was admitted to the bar of our Supreme Court, and entered on the practice of law. He was afterwards admitted to the Supreme Court of the United States at Washington, on motion of Stephen A. Douglas. After "trying his luck" for a short time in San Francisco, he settled down permanently in Sacramento, where he remained until his death. Shortly after his removal to the capital, one Ben Rider, well known in Columbia, killed a man at that place. The case was desperate, and the friends of the slayer determined to summon either General Baker or Mr. Coffroth. Baker charged big fees. He wanted a thousand dollars to go to Columbia and defend Rider. A message was sent to Coffroth: "How much will you

charge to come and defend Rider?" The answer came: "Brandy and water for three days." "Come right away," they sent word back, and he started. His friends secured the highest toned conveyance to be had, harnessed up six black horses, took him from the stage three miles out, and he made a triumphal entry into town. Everybody turned out to see and shake hands with "Jim Coffroth." They overdid the business and came near losing the benefit of his help in the cause which called him. He became very happy, and it was only by a tremendous exertion of will, and the help of black coffee, that he was enabled the next morning to go into court. He was there, however, on time, made his appeal to the jury at the close of the evidence that night, "cleared" his man, received a small fee, and went home.

Mr. Coffroth was confined principally to the criminal department of law. This naturally resulted from his oratorical gifts and his power over juries. He was best when appealing to the hearts of men, when life and liberty were at stake. Merciful himself, he often invoked it and obtained it when it was not merited. Generally for the defense, he was sometimes engaged by the people to prosecute noted criminals. He was during the last five or six years of his life employed by the railroad companies to prosecute train robbers.

Coffroth harbored no resentments. He was absolutely free from false pride. He would speak on the street to the criminals and vagabonds whom he had either defended or prosecuted. "Hello, Bill," he would say, and "Hello, Jim," Bill would answer. Riding to town from the country, he was stopped one midnight near Buck Harrigan's ranch. "Do you know who I am?" he asked of the road agent. "Who are you?" he was asked in turn. "I am Jim Coffroth. If you take my money, you'll have to give it back in a few days; they'll catch you, and you'll send to me to defend you." "Go on, Jim," said the fellow; "I wouldn't take your money."

He was a better politician than lawyer—a politician first, a lawyer second. He wanted to get at the masses. In the midst of his law practice, which, during the last few years of his life, was large, he never cut loose from politics. His ample form was to be seen in every State convention of his party. He was frequently made president, and always dignified the office by his knowledge of parliamentary law, his urbanity of manner and his decision of character. The dream of his life was to get to Congress. More than once he bore his party standard in congressional campaigns, but his district was hopelessly against his political views. He used to tell this story on himself when running against A. A. Sargent:

The two candidates reached a mining town the same afternoon. Sargent was to speak there that night, Coffroth the night after. He attended Sargent's meeting, and stood in the crowd in front of the speaker. When Sargent had closed a man sang out, "Coffroth, Coffroth, Coffroth!" Coffroth

was standing next to him, though neither knew the other, and, thinking the man was an impulsive Democrat, he tried to quiet him. "Hush," he said, "this is a Republican meeting. Don't interrupt it." "O, pshaw," said the man, "he's got through. I want to hear what the other damn fool has to say." Coffroth invited him to drink.

A certain lawyer was arguing a cause before a jury. He was doing it for Coffroth, who was called to another town on a more important matter. The advocate was dry and dull, and labored painfully. Every now and then he would refer to Coffroth's absence, saying that if only he had been enabled to attend, the case would be lucidly and powerfully presented, etc. Pausing once, and looking out of the window, he said again: "I wish Mr. Coffroth were here."

"I wish he was here," exclaimed the judge, impatiently. "Mr. Sheriff, wake up that jury."

Coffroth, when in the Senate, voted against removing the capital to Sacramento. At a jollification in that city over the removal, after the friends of the measure had spoken, Coffroth was called out. He told the people that he voted against removal because he was tired of seeing the capital on wheels; but that, as it had been again moved, he would labor to keep it where it was. About this time petitions were in fashion, praying for the location of the capital at divers places. In a spirit of fun, a petition was started in Sonora, asking that the seat of government be fixed at Campo Seco. The whole county signed it. It was never presented, but was put to effective purpose in another way. Coffroth had recently persuaded a mob to spare a criminal's life, but he failed to clear him when tried before a jury. The man was sent to the state prison for ten years. His friends got hold of the petition just mentioned, which everybody had signed as a joke, cut off the top and pasted on a prayer for the pardon of Coffroth's client. They sent it to the Governor, who granted the pardon.

James W. Coffroth was born in Franklin county, Pennsylvania, in the year 1829. His great grandfather emigrated to that State from Germany, where the name was Kaufrath. James W. came honestly by his predilection for politics, his father having dabbled in the pool all his life. The old man found it unprofitable, although he won the shrievalty of his county for one term. He was poor and his sons had to commence battling with adversity at early ages. James, with little learning, went to Philadelphia to make himself a printer. In that great city, in his fourteenth year, he went to work. He learned the printer's trade and followed it for several years, devoting his spare hours to profitable reading. He made many contributions, prose and verse, to the press, the first appearing in his seventeenth year. He took the platform early. The *Spirit of the Times*, of December 28, 1846, had this editorial item:

Mr. J. W. Coffroth's lecture before the Meridian Sun Division of the Sons of Temperance, on last Thursday evening, is represented to have been a handsome, intellectual effort, and we have no doubt of it.

"Mr." Coffroth was not then eighteen. He set type all day, and at night he was in some lodge or at some political meeting. He did most of the talking—both because he liked it and because his style was so happy that he could not get out of it. His presence was sunshine, and his speech full of charm. In 1846 he became associate editor of the *Spirit of the Times*. In February, 1850, he purchased a half interest in that journal and became chief editor. The circulation was 15,000 daily. In the same year James W. Coffroth & Co. issued *The Sunday Paper*, the second Sunday journal established in Philadelphia. In the first issue Mr. Coffroth called the attention of religious people to the fact that the only Sunday work done on a Sunday paper is the simple distribution of the paper; whereas on a Monday paper all the work *but* the distribution is done on Sunday.

True to his German extraction, the young man was full of sentiment. If there is "Nothing half so sweet in life as love's young dream," he must have had many moments of supreme happiness in Philadelphia. While his poetical effusions embraced such themes as death, and heaven, and hope, they were mostly erotic. He worshiped the beautiful, especially as revealed in women.

One critic observed that young Coffroth was "the ugliest man and the best judge of beauty in Philadelphia." The antithesis was not wholly justified. Coffroth, while not handsome, was far from being ugly. His genial spirit constantly lit up his face, and, aided by his winning speech and bearing, attracted men and women alike.

He was deep in love many times. Among the dear young creatures who enlisted his heart, were Miss Helen M. Denslow and "Pauline;" the latter's personality remains unrevealed. To the former he dedicated a little poem, entitled "The Broken Hearted," which Mr. Kellar, of Kellar & Neff, set to music, and which was published by that firm. He also poured out his soul in song to Pauline, who, in return, sent some verses to the *Times and Keystone*, which appeared therein January 28, 1848.

In 1847, he had had his sweetheart, too, and in 1846 he was equally fortunate. The lady of 1847 was "Alexina;" she of 1846 was "M. A. H." To the first he addressed some stanzas, which he finished at two o'clock A. M., June 22, 1847. There is no record of any response from Alexina. She ought not to have been cold to this ardent confession:

Love, love I will, for day by day,
Despite my bosom's best endeavor,
Thy image haunts me like a fay,
And tells me I must love forever.

This lady was Miss Alexina Fisher, an accomplished young actress, of whom a fine steel engraving may be found on page 657 of the "Annals of

San Francisco." She became the wife of Mr. Lewis Baker, an actor of some distinction, whom she accompanied to California in February, 1852. They played at different points in the State, but chiefly in San Francisco, returning to Philadelphia with a competency in January, 1854.

Matilda Heron was the love of 1846. On October 30th of that year the *Spirit of the Times* contained four stanzas addressed by her to young Coffroth, headed, "To the Absent One."

Oh! soon return. If thy cup be full
And misfortunes round it hover.
I'll sip it off, that, when rudely touched
By Time, it will not run over.

Oh! never return, but stay thus blest,
With thy heart to a fairer given;
To know thou'rt happy is all I ask,
If only we meet in Heaven.

With commendable promptness the young "Lover"—so he signed himself—replied the next day, closing thus:

To dwell in the wealth of thy passionate love,
As in sweets the voluptuous bee,
Till the earth itself seemed Heavened with dreams—
Idoltrous dreams of thee!

Not having fully relieved himself, the young man—he was only seventeen—effused a second time in reply to Matilda, more at length, and with this conclusion:

Return! though absent from thy sight,
My soul hath daily, hourly flown
To watch o'er thee; and oft at night
Thy sweetest dreams hath known.
Light bending o'er thy virgin brow,
Love hears, enraptured, every vow,
And brings each softly murmured thought
Beneath his sheltering wing to me!
Sweet lady, can a heart so fraught
With chastest love and truth, in aught
Be ever false to thee?

A fine steel engraving of Miss Heron, taken some six years later, may also be found in the "Annals of San Francisco," at page 661. She, too, was an actress, and established her fame in San Francisco, 1854. Her unhappy life and her marriage to Harry Byrne, with the consequences, are given in the Chapter on Byrne in this volume—see pages 61-65. When Mrs. Baker departed from the State and Miss Heron arrived, their old lover was living in Tuolumne county, a State Senator, a lawyer and a politician of unexampled popularity. I know not if either of the ladies met him here.

Late in 1850, Mr. Coffroth sold out his interest in his paper, and struck out westward. It seems that it took him some time to catch the gold fever, and it would also appear that when he left Philadelphia, he did not have

either California or the bar in his eye. It is certain that he made a short stay in Indiana, and another in Texas. In Indiana he had a brother, John Randolph Coffroth, a successful lawyer and popular speaker, and who attained later to the Supreme bench of that State. Coffroth arrived in California in 1851, and located in Sonora, Tuolumne county. He came with a view to work in the mines, and settled at a most inviting spot in the midst of stirring scenes. He was but 22 years old. He came, as he had gone to Philadelphia, alone, and with no means. It is said that he went into the mines with his pick and shovel, but if it is so, his stay was short. In June 1851, he is found in the editorial room of the Sonora *Herald*, having for a few weeks previous set type on that paper.

On June 26, 1851, he had a lively introduction to a feature of pioneer life. At two o'clock A. M. he was at his rude editorial desk, while Dr. L. C. Gunn, the proprietor, was in an adjoining room asleep. Suddenly a lot of gamblers whose vocation Dr. Gunn had assailed, rushed in, dragged the Doctor from his bed, and shot him through the head, killing him instantly. They then fired at Coffroth, and it was widely announced next day they had killed him; but he was unhurt. The compositors, hastening to the scene, several of them were also shot fatally. The sequel need not be told, as my subject escaped.

While connected with the *Herald* Mr. Coffroth resumed writing verses, which appeared from time to time in that paper. He delivered the Fourth of July oration in Sonora in 1851. It was a happy effort, and the miners gathered in a large mass from the country round about. He amused, entertained and thrilled them, and that hour he became what he was ever afterwards called—"Tuolumne's Favorite Son."

Just about that time a certain ditch monopoly, which supplied all the miners of that region with water, had become so unpopular, on account of extortionate charges, that the victims of its rapacity were compelled to organize for self-protection. Coffroth joined the movement, and fired it with his own enthusiasm. It was resolved to make an opposition ditch. Nearly everybody subscribed, and scrip was issued to the subscribers, to be called in and paid for out of the receipts from the ditch. It took several thousand men a month or so to complete the work. Coffroth's was the animating, all-pervading spirit. He worked himself, shovel in hand, but did more effective service by his eloquent speeches, his stories and witticisms, which kept the army of workmen in good humor until their task was done.

When the Democratic State Convention met in the fall of 1851, Mr. Coffroth was a delegate from Tuolumne county, the youngest member of the body. He looked as mature as some delegates at thirty, being six feet high, with broad shoulders and massive head and frame. The ticket nominated

by that convention was elected, and at the same time Mr. Coffroth was chosen by his county to represent it in the assembly.

The enactment of the sole trader law of 1852 was a departure from all precedent, and so warmly did Mr. Coffroth advocate its passage that it is interwoven with his legislative record. The essence and intent of this law were absolutely pure, although it has often been made the cover of fraud.

There were three gentlemen, above all others, prominently connected with this first movement in our history for the relief of women. These were Hons. E. F. W. Ellis and James W. Coffroth, of the assembly, and Mr. Philip A. Roach, of the senate. The bill to permit married women to transact business in their own names as sole traders was introduced in the assembly by Hon. E. F. W. Ellis, of Nevada county, February 6, 1852. It was referred to the judiciary committee, which recommended its passage. Notwithstanding that fact, and notwithstanding, moreover, the able advocacy of the bill by Messrs. Ellis and Coffroth, it was indefinitely postponed by a vote of nearly two to one. As, under the rules, a bill indefinitely postponed in one branch of the legislature could not be brought up in the same house at the same session, the friends of the sole trader measure determined to bring it, as an original bill, before the senate. Accordingly, on March 17, 1852, Mr. Roach introduced a bill to authorize married women to transact business in their own names as sole traders. It was referred to the judiciary committee, which reported it favorably, and, after a warm debate, it was passed—ayes 19, noes 5.

The main arguments advanced by the opponents of the bill were that it would encourage dishonesty—that creditors of married men would be defrauded—and that it was a dangerous innovation.

The bill had yet to pass the ordeal of the assembly, where it had recently met an untoward fate. Messrs. Coffroth and Ellis again took it in charge and Senator Roach left his seat in the upper branch for awhile to give his individual aid and influence. In the assembly were several native Californians, who could not speak English, yet who were intelligent men, and who managed to inform themselves, and to vote intelligently, on every proposition. One of these, when the bill came up, Mr. Covarrubias, of Santa Barbara, spoke in Spanish, in its support. It so happened that before Mr. Covarrubias commenced his speech, Hon. Robert Robinson, of Sacramento, moved that Senator Roach, who was present, be invited to act as interpreter. This was carried, and Senator Roach took full notes of what proved to be an eloquent and argumentative effort.

This bill passed the assembly by a vote of more than three to one. Governor Bigler approved it, and it has ever since, with slight modifications, remained on the statute book. Its long trial has demonstrated the ability of woman to carry on business in a business way, it has shown signally her

distinguished man," said the startled lady. "He is distinguished chiefly for his dexterity in chopping meat," said her partner. "I will point him out to you, if ever you visit our town. He's about played out in politics, and will have to stick to his cleaver in future." So saying the avenged man bowed himself away, and made *his* report.

There was another young lady at the ball. She was the daughter of James F. Cooke, of San Francisco, a famed belle, one of the most beautiful of women, of elastic step and queenly carriage, and eyes full of sentiment. They "rained their influence" upon the Senator. The conflict was short. They were soon wed, and from the union, which lasted until Mr. Coffroth's death, there were five children. Of these a son and daughter are living, the former being James W. Coffroth, Jr., now a grown man. They reside in San Francisco with their mother.

The final end of this interesting man came suddenly and too soon, but it is pleasant to record that it was free from pain. At a quarter to nine o'clock, on the morning of October 9, 1872, at his residence, in Sacramento, while seated on a sofa, at a front window, awaiting a street car to take him to his office, he fell to the floor and expired instantly. His family, servants, physicians and a host of friends, soon stood around his body, only to find that he was beyond help. The capital city mourned as it had rarely done, and all the people bowed around his grave. At the bar meeting, besides the speech of his fellow partisan, General Jo. Hamilton, his old political foes, but steadfast friends, Judge T. B. McFarland, Judge Samuel Cross and Hon. D. W. Welty spoke with deep feeling. General Hamilton declared: "If I were in a position where I needed the cool, clear, careful judgment of one who would protect my honor and keep me to duty, if I wanted a man to stand by me in a strong, stern struggle that called for manhood and intellect and true friendship, to James W. Coffroth would I have gone above all men."

"He was the most pleasant man I ever met," said Judge McFarland: "let us resolve that his memory shall not perish."

"He never stopped to speculate out of his misfortunes," said Judge Cross; "he scorned to do it. In many instances I knew he could have done it, but he never did. I knew his personal worth, and for this more than once I voted for him against my party candidate."

"He was a sound lawyer, a close reasoner, a good man," said Mr. Welty, "I have observed his character and career; the whole Pacific coast knew him; he was one of the strongest men of our nation."

Expressions of tender eloquence like these fell from the lips of all classes of men, from Portland to San Diego. Known so well and widely, he was bitterly lamented by a great people. Bitterly lamented and eloquently mourned—it was all that could be done for the dead.

CHAPTER XXIV.

Ogden Hoffman, of the United States District Court—The Senior in Service of All American Judges—Some of the Great Causes that Have Come Before Him—Position on the Chinese Question—Among the Polyglots—Severe Views on the Art of Verbal Expression—The Gift of Tongues—Early Life in New York—Reference to Some Old Bar Leaders of that State—A Deer Hunt in California with J. Ross Browne—A Subject for Browne's Satire.

Not alone for its long, unbroken chain has this life on the bench been remarkable. To change the simile, we seem to be looking at a strong river rolling through a rugged country, but preserving a deep channel all the way; for the career now to be traced probably antedates, in its inception, that of every other judge, State or Federal, in our broad land. It has been cast in an era of intense activity; an era of the contact of races, fruitful of change, of turmoil, of commercial crises, of social and political earthquakes, of the rise and reconstruction of States and parties, of radical changes in governmental polity, of radical changes, as well, in the forms and practice of law, of individual aggrandizement and colossal fortunes, of startling contrasts between wealth and want, of adventure, exploration, invention and discovery; of agitation, ambition, war—an era of travail, but withal an era of Advance.

Judge Hoffman's ancestors came from Holland, and were among the earliest settlers of New Amsterdam. His father, Ogden Hoffman, also a native of New York, was long a leader of the American bar, and of the Whig party. He opposed the Mexican war. In debate he was brilliant, in argument clear and strong, in style ornate, a master of the art of expression. He frequently made political speeches, and his fame as an orator was national. Edwards, in his "Pleasantries," applies to his oratory the words used by Charles Butler in speaking of the style of Sir William Grant: "The charm of it was indescribable; its effect on the hearer was that which Milton describes when he paints Adam listening to the angel after the angel had ceased to speak.

"The angel ended, and in Adam's ear
So charming left his voice, that he awhile,
Thought him still speaking, still stood fix'd to hear."

Ogden Hoffman, father of the present Judge, besides being eloquent and strong in expression, was very dangerous at repartee, and said many witty and striking things that have passed into printed volumes. A certain lawyer in New York was employed to draw a will, and going with it to the testator's house, was told at the door to hurry upstairs, as the man was evidently passing away. He hastened to the bedside and read the will, which was a very long, complicated document, the man signed it, and died in a few minutes

afterwards. The will was contested. Charles O'Connor, who made an argument in the case, said that the lawyer "ran a race with Death and he won." Ogden Hoffman observed that the will "was like the gourd of Jonah, which grew up in a night, and like that gourd it had a worm at the root."

Hoffman was once associated with William M. Evarts in the prosecution of three men for murder on the high seas. Erastus C. Benedict and Luther R. Marsh defended, and they agreed to pursue a policy which is frequently adopted in criminal trials. They told the jury in most extravagant terms of the force and brilliancy of Hoffman, who had to close the argument, and they brought the jury to a high pitch of expectation, hoping that Hoffman would fall short. Marsh, quoting from Theodore De Weld, declared that Hoffman was "one of those who could rise upon the heaving exigencies of the moment, and, at whose bidding, instant creations and mighty embodyings of thought and argument, sublime conceptions, glowing analogies, and living imagery burst, as by miracle, from the deep of mind, in overshadowing forms of majesty and power." Hoffman, when his turn came, said: "They have praised me beyond my deserts. Their praise has been suggested by interested motives, so that they might lessen the just weight of the argument I shall present to you. They have decked me with roses and crowned me with laurel, that they might strike me on the head with their consecrated axes."

This (the elder) Ogden Hoffman was the exponent of the New York bar when it was called upon to manifest its respect for the memory of the venerable Chancellor Kent, in January, 1848. His remarks are given in Edwards' "Pleasantries," from which I get most of my information concerning him. At his own death, in May, 1853, a crowded meeting of the bar was held, at which William M. Evarts and other able men spoke of his forensic triumphs and his greatness of mind.

This transmission of brain force from father to son, through several generations, marks this line of Hoffmans as one of the comparatively few families which have been so distinguished. The other names which make up the roll of American hereditary genius are Adams, Bayard, Beecher, Binney, Breckinridge, Dana, Jay, Kent, Hayne, Holmes, Randolph (not the Roanoke man), Story, Sedgwick, Sullivan, Van Buren and a few more. The Hoffman line is approaching its end. Judge Ogden Hoffman in the sunset of life is wifeless and childless, and, on this subject, speechless.

He was born in New York City, October 15, 1822. Graduating from Columbia College at the age of nineteen, he commenced the study of law at Dane Law School, Harvard, where for two years he had the benefit of instruction under Judge Story and Simon Greenleaf. He removed to Canandaigua, New York, and continued study in the law office of Mark Sibley, shortly re-

turning to New York City; and completing his studies in the office of Benjamin D. Silliman. After being admitted to practice, and before commencing business, he traveled in Europe, as John B. Felton did a few years later, spending, as Felton did, most of his time in Paris, where like Felton, too, he acquired a good knowledge of the French tongue. He also learned something of other modern languages, and was already accomplished in Greek and Latin. After nearly two years' absence he returned and commenced law practice in New York City. Like Hall McAllister, he did not feel the spur of want, and like him he had the timely counsel and encouragement of a father who had achieved success in the profession of his choice, and who had worked out for him the heritage of a distinguished name. After a brief practice in New York, he removed to San Francisco, arriving May 16, 1850, and entered on the practice. He had not obtained much business, nor had time to do so, when he was appointed to the bench. It will never be known what figure he would have made at the bar. He evidently would have been true to his father's fame, in facility of expression, logical statement, keenness of perception and knowledge of the law; but as an orator and advocate, it is probable that he would have been wanting. He had not been here a year when—in March, 1851—President Fillmore appointed him Judge of the United States District Court for the northern district of California.

He hesitated before accepting the position. He was young, and felt that greater emolument and distinction awaited him at the bar of this growing and litigious community; besides, he regarded the appointment not so much a recognition of his own ability as a graceful compliment to his father, who was a warm personal friend and political supporter of President Fillmore. But his friends, of course, advised him to accept the high and life-long honor; so did his father, and he entered upon that judicial service that has been so notable and protracted.

At that time there were two United States District Courts in California, the State being divided into a northern and southern district. Judge Hoffman's salary was \$3,500 per annum, that of the judge of the southern district being \$2,800. In August, 1852, Congress passed an act consolidating the two courts, with Judge Hoffman as sole judge at a salary of \$5,000 a year—which sum he has ever since received, although it was during the war really about half of that amount, owing to the depreciation of greenbacks. Judge Hoffman's salary is now higher than that received by any other United States District Judge. In Louisiana the salary is \$4,500, in New York and some other States \$4,000; and in some States it is as low as \$2,500. In 1886 Congress again created a United States District Court in Southern California.

In command of language, facility of diction, the art of expression, Judge Hoffman has no peer in this State. Judge McKinstry's written opinions read

as well, but Judge McKinstry, in rendering an oral decision, is certainly less happy in diction than Judge Hoffman. If a trial suddenly culminates and the result is apparent, Judge Hoffman is never taken by surprise. He expresses his views promptly, fully, and with all the elegance of speech which the most patient reflection could give. His reported opinions are models of style, as well as rich food for the law student.

Upon this subject of readiness and aptness and fullness of speech, Judge Hoffman holds radical views. He says it is not a gift, but comes by education. His extraordinary command of language has often been the theme of comment among lawyers. Of course, in this nimble-witted age, he could not hope to escape facetious criticism. J. Ross Browne made him the hero of his wittiest emanations. This will appear below. In a social company once the Judge was complimented upon his faculty of speech, and this led to a general discussion of the subject of verbal expression, in which the Judge took an earnest part. A member of the party was Hon. W. W. Morrow, who had formerly been Assistant Prosecuting Attorney in Judge Hoffman's court. I have said that Judge Hoffman holds extreme views on the subject of verbal expression. On the occasion last referred to he took the ground that if a man *understands an object—knows it*—he cannot fail to *describe* it. Issue was taken with him at once. He proceeded to illustrate:

"Describe a circle," he said to Mr. Morrow. Mr. Morrow described a circle—the best he could—he was only a little off, but he made a mistake. "I see you don't know what a circle is," said Hoffman. "If you did, you could describe it." Mr. Morrow protested that the illustration was unfair. "I know a circle when I see it," he said. "I can distinguish it from a square or a triangle, but I cannot now perfectly define it." But the Judge insisted that Mr. Morrow did not know what a circle was.

There is no doubt that a person who understands a subject or an object can discourse more intelligently and fluently upon it than one who is ignorant concerning it. It seems witless to state so simple a truth. Some one has observed that "clearness of language flows spontaneously from definite and precise ideas." Is it always so? There are men of intelligence who cannot expatiate. And some men are much slower than others in their mental processes—just as they are in bodily movement. George Stephenson could not explain the great work of his hands to a party of capitalists who called to inspect it, and to be informed about it. His lawyer friend, Sir William Follet, stood by his side, however, and explained everything elaborately and satisfactorily. Did Sir William Follett know more about that machinery than the great master did?

Daniel Webster, the *expounder*, the man of mighty grasp of mind, sometimes had trouble in the effort of expression. He once spent half an hour in

trying to find a single word—the right word in the right place. Benjamin R. Curtis came to his rescue, and gave him the proper exponent of his great thought.

On the other hand, there are men who can discourse at length upon subjects which they have not properly investigated. There is one lawyer at this bar who, if he catches the tail end of an idea, can talk for hours upon it. I have seen him address the court with great eloquence and earnestness. A crowded courtroom could not be restrained from applause. But the fact was, he did not have a proper conception of his theme, although a hundred men thought he was full of it. He hardly knew what he was talking about. He was talking, though.

The three greatest masters of expression who have spoken from the bench in San Francisco are Ogden Hoffman, E. W. McKinstry and E. D. Wheeler, yet their knowledge of law is not greater than that of perhaps a score of others who have adorned the bench of the city and State.

As before observed, Judge Hoffman's facility of speech has been made the excuse for any amount of wit and satire. The late Edmund Randolph regretted that the Judge did not stutter. It is related that the Judge was once visited at his rooms by two gentlemen from the East. He was talking at the time with Richard E. Brewster. The visitors were cordially received by the Judge, who proceeded to "hold, occupy, and possess" them. A half hour passed, in which they had no opportunity to open their mouths. Rising to withdraw, the Judge talked them out of the door, along the hall, and down the stairway. Returning to his parlor, Brewster asked, "Judge, did you at last get rid of those fellows?"

There appeared in *Harper's Magazine*, in 1861, a series of very amusing papers by J. Ross Browne, reciting incidents of a trip to the coast range by a party of San Franciscans. In these papers, which are illustrated, Judge Hoffman is made to cut a conspicuous and ludicrous figure. He is made to talk the rest of the party to the brink of the grave. When one Tom Fry was thrown by his horse into a bed of quicksand, and appealed to the Judge for help, no one else being at hand: "What in the world must I do?" exclaimed the Judge. "There is not a stick or willow bush, that I can see, within half a mile. If there were any Indians in this vicinity I would not hesitate to solicit their services. Ungenerously as they have been treated by the white race, I scarcely think there is one so lost to every sentiment of humanity as to refuse aid to a suffering fellow creature in an emergency like this." He then goes off into a long dissertation on the policy of the government towards the red men, which poor Tom had sunk to his armpits, when Captain Toby came on his broncho, and first rescuing a keg of whisky, secured the lasso.

This is the way the Judge met his first deer—according to Browne. Captain Toby had fully instructed him how to hold his gun and where to aim, and, a splendid buck coming into full view sixty yards off, the rifle was pointed directly at the animal, and Toby said: "Shoot, Judge. Be quick!"

"Toby," said the Judge, turning his face toward the Captain, the rifle still fixed accurately upon the deer. "Toby, I shall never forget your kindness in affording me this opportunity of killing so noble an animal. Such a buck as that would be a splendid achievement for any man. Should it ever be in my power to reciprocate this favor, rest assured, my dear sir, it will afford me the most sincere pleasure to do so. Call upon me at any time, in San Francisco, and command me for any service not inconsistent with my public duties. Amidst the cares of office this will be an incident to remember with unbounded satisfaction. I can now truly appreciate the fine flow of spirits with which Christopher North describes the chase of the red deer in the highlands of Scotland. His sketches, indeed, may be considered the very poetry of hunting. With what genial freshness he dashes them off, as if his pen were dipped in the dew that sparkles on the mountain heather. We hear the birds sing, as we wander through his aviary. We see the eagle perched upon his eyrie, and the hawk swooping upon his prey. We laugh at the green goose, which popular tradition or vulgar prejudice has fixed upon us the emblem of foolishness. This ignoble bird whose home is in the barnyard is no more to be compared to the goose—the wild goose—than the fatted calf is to the fleet and slender antelope. His eye pierces the firmament, and his graceful form, sleek and sharp, cleaves the heavens. This noble bird is the very incarnation of beauty and wisdom. Not even the royal eagle, the bird of Jove, the reputed king of the skies, born on the rock of ages, gazing upon the sun, affronting and outstaring the light, whose palace is in the craggy cliffs, and whose domain is in the high heavens—not even he can compare with the wintry wanderer who carries the seasons upon his prow. The eagle is limited in his flights, and wheels over a few miles of weather-beaten rocks. Not for him is it to cross wintry oceans, trackless deserts and boundless continents, in a line drawn by an inscrutable instinct through the firmament. See with what ease, steadiness and precision the emigrant geese move in their long journey; how adroitly they elect their leader, and cleave the air; how undeviating their course. The intonation of their voices possesses a penetrating power beyond the influence of space. They are the incarnation of wildness, the antipodes of civilization, the Ishmaelites of the feathery world. Whence they come we know not, whither they go, who can tell. What a wonderful instinct is that which teaches them to follow a line through the trackless wastes of ether, by day and by night, in sunshine and in darkness, without guide or compass, resting by the way only for food,

rising again and pushing steadily onward till they reach their destination in some wild, watery plain! He who holds the winds in the hollow of his hand, who sweeps the earth with trailing clouds, hath created a power more wonderful than reason!

"The flight of geese possesses a charm that fills the imagination. The uncertainty of their destination is a fascination in itself. We know not where they will rest, what new and unexplored regions they will visit. As they grow dim in the distance we feel that we are of the earth, earthy. Something akin to despair seizes us as the great truth flashes upon us that man, the noblest of God's works, is, after all, but a kneaded clod; in this respect inferior to the goose—he cannot fly. I never hear the voice of this strange and tireless wanderer of the firmament—this thing of distance and the unfathomable wilderness—without an undefinable feeling that carries me back to the days of my boyhood—to something that has been and never will be again. They strike, in their rapid flight, an Æolian chord, as if the wild winds played upon the heart, and wrought out of it a strain of harmony in unison with the untamed spirit that lies in the inner nature of man —"

"But, Judge, our deer has vanished," said Captain Toby, interrupting. "Vanished!" exclaimed the Judge. "Have you any idea where he has gone?" "Oh, yes," said Toby, "I know that buck intimately. Whenever he sees a rifle pointed at him he always scampers off. He is about three miles from here now; the trail is a little gulchy." The Judge was silent a moment, then observed: "On the whole, I am satisfied that the buck I was about to shoot pursued the most judicious course. I had a very fine aim on him, and would certainly have killed him had he remained in the same spot a moment longer."

It is said the Judge never forgave Browne for this satire. While it is all, or nearly all, pure invention, it is too good to be left out of this chapter.

There is another point upon which many persons will take issue with Judge Hoffman. I heard him declare many years ago that it is impossible for any person, no matter how studious and talented, to *master* any language but his own. And so says Hamerton, in his "Intellectual Life."

It is of course phenomenal, but there have lived men who were reputed masters of many tongues. Sir William Jones (1746-1794) was, we are told, a linguist who had no superior but Mezzofanti; he knew twenty-seven languages, and had *critically mastered* many of them. Mezzofanti (1774-1849), the Italian linguist, studied languages all his life; he knew one hundred and fourteen tongues, and Byron, whom he is said to have beaten in talking English slang, pronounced him "a monster of languages, a Briareus of parts of speech, and a walking polyglot." His biographer tells us that his familiarity with the dialectical varieties and local idioms of the principal languages,

as well as with their respective literatures, and his power of passing instantly from one to another, in conversation, were almost incredible. It is pleasant to add of a man so remarkable, that he possessed great virtue and modesty, was open hearted, amiable and abstemious.

Among the important causes which have engaged Judge Hoffman's attention was the contest over the New Almaden quicksilver mine, near San Jose, referred to in the chapter on Randolph. This mine enriched a score of men, and its development has given employment to a little army of laborers for more than a generation. The history of the trial of this great cause has been printed in five octavo volumes, comprising thirty-six hundred pages. One hundred and fifty-three pages of the fourth volume are taken up by Judge Hoffman's opinion.

In Judge Hoffman's judicial retrospect the Limantour case is the most prominent to the eye. This was, perhaps, the most extraordinary civil trial that ever occurred in this State. Limantour, a Frenchman, who had lived many years in Mexico, claimed 15,000 acres of land, covering nearly all the city of San Francisco, also the islands of the bay, and large tracts of land in the interior, one of which included the city of Stockton. His claim to the city and the islands were actually confirmed by the Land Commission, and they were taken before Judge Hoffman, on appeal. The bases of the claims were two alleged grants from Governor Micheltorena, dated in 1843. These were finally shown to be forgeries. Judge Hoffman's opinion, covering 61 pages, is a history of this noted case, and as such will always be invested with deep interest for our citizens. And, on this case, see the chapter on Felton, pages 31-33.

In the habeas corpus matter of Tiburcio Parrott, before Judges Sawyer and Hoffman, in March, 1881, in which both Judges concurred that the anti-Chinese provisions of the new constitution of 1879 were in conflict with treaty stipulations, and therefore void, Judge Hoffman used this language in an elaborate opinion :

That the unrestricted immigration of the Chinese to this country is a great and growing evil; that it presses with much severity on the laboring classes, and that if allowed to continue in numbers bearing any considerable proportion to that of the teeming population of the Chinese empire, it will be a menace to our peace and even to our civilization, is an opinion entertained by most thoughtful persons. The demand, therefore, that the treaty shall be rescinded or modified is reasonable and legitimate. But while that treaty exists, the Chinese have the same rights of immigration and residence as are possessed by any other foreigners. Those rights it is the duty of courts to maintain and of the government to enforce. The declaration that "the Chinese must go peaceably or forcibly," is an insolent contempt of national obligations, and an audacious defiance of national authority. Before it can be carried into effect by force, the authority of the United States must first be not only defied but resisted and overcome. The attempt to effect this object by violence will be crushed by the power of the government. The

attempt to attain the same object indirectly by legislation will be met with equal firmness by the courts—no matter whether it assumes the guise of an exercise of the police power or of the power to regulate corporations, or of any other power reserved by the State, and no matter whether it take the form of a constitutional provision, legislative enactment, or municipal ordinance.

In 1862 Numa Hubert issued a volume of Judge Hoffman's opinions in land cases, as originally prepared and delivered. His later opinions are contained with those of Judges Field, Deady and Sawyer, in L. S. B. Sawyer's reports.

A prominent lawyer was a witness in a bankruptcy case in Judge Hoffman's court, and was accused of sharp practice in connection with certain legal proceedings upon which the bankruptcy was predicated. He openly admitted what he had done. The cross-examining counsel inquired: "How came you to do this?" The reply was, "I saw no objection; I owed them nothing." The Judge, turning to the unabashed attorney, remarked, "That is probably correct; but did you owe nothing to yourself?"

A lawyer rushed into the Judge's court one day, in a high state of excitement about a ship that had been libeled and was in the custody of the marshal, for some alleged violation of the federal revenue laws. He was anxious to have her released. He complained loudly of the action of the authorities, which he declared would cause serious inconvenience and damage, and said that the case was all the worse because the ship was leaking and half filled with water. He asked the Judge what ought to be done under the circumstances. The dry reply was, "If I were in your place, I would bail her out."

The *venerated* joke, given elsewhere, is told freshly and differently by a friend of the Judge: The Assistant United States District Attorney asked the court for a *venire* for thirty jurors, pronouncing the word *vencer*. The Judge said he should have it of black walnut or rosewood, according to his taste.

Judge Hoffman seems to have few familiars, but he has many friends. As a Judge he is a favorite with our leading lawyers. His manner is quiet and grave. He treats all alike. His mind is active, his apprehension quick, and his knowledge of law deep and thorough. He catches an idea promptly, comprehends a proposition at once, even if it be complicated and involved. When a lawyer reads to him from a book he is not required to "pass up that book," that it may be further consulted. He has pursued the line of duty unfalteringly throughout his long career, and the closest scrutiny shows not a stain upon his robes. Very seldom has he participated in public demonstrations, popular movements or literary entertainments. He lets politics severely alone. The son of an eminent Whig leader, he was taught to reverence Henry Clay, and I believe the only public address he ever delivered was his oration upon the career of the great statesman, when it ended in 1852.

This was a thoughtful and polished effort which is preserved in the local newspapers of August of that year.

In a quiet way this veteran of the bench extracts a good deal of pleasure from life. A bachelor, he passes much of his time at his club, where his delightful conversation is fully appreciated. He has always enjoyed good health. His step is still light, his movements alert, and his erect figure may be seen daily on the street.

CHAPTER XXV.

Creed Haymond, General Solicitor of the Great Railway Company—A Record of Work Well Done and Results that Will Endure—Old Virginia Days—A Boy's Diary Across the Continent—In the California Mines—Carrying the Mail—At the Bar in 1859—Subsequent Career as Lawyer and Legislator—Defense of Reagan—The Two Shepardsons—The Murder of T. Wallace More—Novel Way of Securing a Jury—Trial of Troy Dye—The Mortgage Tax Cases—The Debris Question; Only Victory of the Hydraulic Miners—The California Law Codes—In the State Senate—Report on the Chinese Question—Plans for Irrigation and Reclamation—An Indian Campaign With Jack Hays—Opposing the Constitution of 1879—In National Conventions and Before the U. S. Supreme Court—Counsel for the Southern Pacific System—An Historic Argument Before a Select Committee of the U. S. Senate—The Railroad Builders and Their Vast Work—The Leland Stanford Jr. University—Interpreting the Interstate Commerce Act—Perfecting the Code System—Looking to a Farm in the Sunset of Life.

This brilliant bar leader has won distinction in the high places of national observation, and almost every year of the State's history since he attained manhood bears the impress of his vigorous mind.

We have had able lawyers and wise statesmen, but few others of our citizens have, to a like degree, combined the maker as well as the interpreter of law. As a political leader and as an orator he is among the very first. He is as ready in addressing a rugged mountain audience as he is in a passionless argument before the Supreme Court of the United States, and in every political campaign within thirty years he has been a conspicuous figure.

Mr. Haymond was born in Beverly, Randolph county, Virginia, April 22, 1836, but went as a child to live at Fairmont. Both Beverly and Fairmont are now in West Virginia. He came to California from Virginia in 1852, camping en route at Independence, Missouri, on his seventeenth birthday. After an absence of thirty-five years, he revisited, early in 1888, the quaint old town of Fairmont, and was received by his fellow townspeople, many of whom remembered him as a boy and were proud of his achievements as a man. In a pleasant allusion to this visit Mr. Haymond said to a friend that he found the old place but little changed, except that the hotel, so huge as he remembered it, had dwindled to quite ordinary dimensions. His father's house, begun sometime in the thirties, was still as sound as ever. He recollected when a child seeing the workmen on the building laboriously ripping out planks, and making the tongues and grooves, by hand; but the work was something to be proud of, and one of the men had said to him at that time: "They tell me out in Oregon they have trees which would cut up into planks as wide as this floor, and I want some day, when some

Oregon fellow comes here, to have him think that this floor was made of one of those planks." Oregon and California existed then but vaguely in the popular mind.

Between the Virginia of those and earlier days and the California of the Argonauts there existed a singular contrast. Money was then almost unknown in western Virginia. Coffee and sugar were about the only articles paid for in cash. Business was usually transacted by means of barter, and credits were very long. Feathers formed one of the staple articles of trade, and when a payment was made in this form of currency the storekeeper thrust them through a hole in the floor, beneath which a sack was suspended to receive them. Promissory notes for two dollars and three dollars—payable "thirty days after the first freshet"—were common. All trade was dependent upon the flatboats going down the river to Pittsburg, Pa. These boats never returned, but the men walked back, each with a section of the hawser wrapped about him. A farmer who cleared \$150 a year thought himself well-to-do. Chancery fees were fixed by law at \$16 $\frac{2}{3}$. A hundred dollars was thought an enormous fee, and a Judge with fifteen counties on his circuit received \$1,300 a year. To young men of spirit, reared under such narrow conditions, the marvelous stories from California came with irresistible effect, and young Haymond was one of those who early yielded to their influence.

The Haymonds are extremely few in number. Though one ancestor is reported to have had thirty-one children, twenty-eight of whom lived to be married, they were on the maternal side of the family, and did not perpetuate the name.

Mr. Haymond's family on both sides had resided in Virginia since long before the Revolution, and many members of it had been prominent in her political affairs. His father, Hon. W. C. Haymond, was distinguished at the bar, and through him the son was inspired by a love for the law that was unusually intense, receiving his first impressions under very peculiar circumstances. The courts of Virginia were in those days itinerant—that is to say, the Circuit Judge, accompanied by the local bar, rode from town to town to hold court. Mr. Haymond's father rode circuit with the rest, always taking with him Creed, after the latter had reached a suitable age. The boy rode astride of the saddle in front. This was before young Haymond had reached the age of sixteen. His early life was, therefore, spent in an atmosphere very unlike that which surrounds the ordinary boy.

The writer has often heard Mr. Haymond speak of those old days, of the uncommon relations existing between his father and himself, the rare lessons he received during moments of leisure, when, seated upon mother earth they took their lunch at noon; of the long rides between broad plantations, down dusty roads, across babbling brooks, sometimes alone with his father,

sometimes forming part of a gay cavalcade, embracing the brains and wit of all the country-side.

Often, on a rough-hewn bench in the primitive Virginia courtroom, through the long summer day and away into the twilight, when the flickering candle was brought in to emphasize the darkness, the lad sat, listening in boyish wonder to the intellectual contests of the great men of his county, with an interest that grew with his own growth. Barefoot village lads, drawn by curiosity or weary with play, peeping into the courtroom, and emboldened by the sight of one as young as they, would sometimes enter and sit beside the slender pale-faced boy, and staring at him wonder who and what he was; but in a little while—wearied by the nice, sharp quilllets of the law—they would hurry to resume their sports, leaving the strange boy to himself again.

This experience left its mark. It made the young student manly, self-reliant, and independent; gave to him the breadth of view that has characterized him as a man; gave to his physical nature, bravery; to his mental nature, boldness of thought.

At the age of seventeen, of his own choice, he left his Virginia home with a party of friends, boys like himself, no one of them being over twenty, and crossed the plains to try his fortune in California. They traveled fast for those days, carrying water in kegs and looking only for grass for their animals; but it seemed like a strange dream to go through almost the same region long afterwards, at more than thirty times their best speed then.

In looking through some old papers several years ago, a friend of Colonel Haymond chanced upon a little time-stained blank book, which had been mislaid for a generation. It proved to be a diary kept by our subject while crossing the continent the first time. It is written in a round boyish hand and begins on the 29th of March, 1852, the day when the little party of boys left Fairmont, and ends with August 26th, 1852, on which day they arrived at Rabbit Creek Diggings, about seventy-five miles north of Marysville; every day being numbered, from the first up to the one hundred and twentieth. This diary the young traveler kept for the entertainment and in the honor of his father, to whom it is committed in a quaint little "preface," which closes:

"I intended to send you a copy but time would not permit, and you will have to take it as it is written—by the light of a camp-fire or at some leisure moment—often writing when I felt no desire to do so; only I thought it might afford you, as well as myself, pleasure in after years to read this book, and think occasionally of that period, which as yet has been the most eventful in my short life. And the events are here recorded."

The story is told with a simplicity and directness which transcend mere tricks of style, and make it very readable; and there is something in its enumeration of details and the absence of all obscurity which is prophetic

of Mr. Haymond's later method. The information contained in the diary was published in the papers of that day for the guidance of those who proposed making the journey, for the region was even then an almost unknown country, and much that was published about it was far from trustworthy.

So little, indeed, was known as to the country, even after many thousands of emigrants had passed over the route, that up to the beginning of the railroad era, and somewhat beyond it, the Rocky mountains were looked upon as an impassable barrier—like the Sierras, but more formidable. The surveys proved this to be an illusion. Many of the earlier emigrants believed the Humboldt river emptied into the Pacific ocean, and abandoned their wagons with the idea that they could reach Sacramento by following the course of that stream.

Young Haymond's account, in fact, constituted a very important topographical survey, containing such things as a man of military instincts would be likely to take note of. The writer never failed to mention the location and quality of feed, fuel or water, and the condition of roads and fords, the quantity and nature of game, and the temper of the Indians. On the first page, but probably last written, there is a list of the Fairmont party, which reads: "Dead, James D. Lamb; Ophir, Jacob S. Hayden; Rabbit Creek, Martin Hurley; Ophir, Creed Haymond; Rabbit Creek, George W. Paris." Then comes a table of distances traveled from Independence, Missouri, to Sacramento. On one of the closing pages is a bill of goods, dated at Rabbit Creek, September 2, 1852, bought of Lester & Bro., by "Lamb, Haymond & Co." in which flour figures at \$15 a sack, potatoes at \$10, corn meal \$11.25; molasses at \$3.50 a gallon, and a side of bacon \$5.40; this evidently for the instruction of his father. Then follows a list of articles necessary as a "California outfit for 140 days for five men," with very judicious instructions as to many matters of importance to the intending emigrant. There are also memoranda, presumably as to Mr. Haymond's places of residence: Fairmont, March 28, 1852; Rabbit Creek, October 14th; Marysville, October 22d; Sacramento, October 28th; Ophir, November 1st. Then a note of the burning of Sacramento on November 2d, 1852; and one recording the death of James D. Lamb, on October 7, 1852.

The Fairmont party went by stage and steamer to Pittsburg, Pa., and thence by the steamer Granite State to St. Louis; time from Fairmont, twelve days. An exhilarating sense of danger haunted the traveler by steam in those days. The Redstone, Glencoe and Saluda, river steamers, all blew up during the time the party spent after leaving Pittsburg. They passed the wreck of the Glencoe, and saw the blood-stained fragments of the Saluda, whose explosion caused the loss of 125 lives. Their own boat caught fire three times, had a snag run through her cabin, lost her rudder, and burned out her boilers, each incident involving hours of delay.

An outfit was purchased at St. Louis and was taken by steamer to Independence. About two miles from that place their first camp was made. After this they had an exceedingly rough experience for several weeks, owing to bad roads, difficult fords, and heavy rains, but were rarely out of sight of other wagons, the line when viewed from some elevation stretching as far as the eye could see. During that time they made an average of fifteen miles a day.

On the nineteenth day out the body of a murdered man was discovered by the roadside, and the lawyer-like manner in which young Haymond proceeded in this case showed the bent of his mind:

"About two o'clock, as we were riding along, our attention was attracted by a body of men some distance from the road. We rode out and saw a murdered man. He had been found by a man from Indiana, who had been hunting, and when passing along the road saw a wolf digging at something, followed it and shot at but missed it. Returning he saw the upturned face of a man, his body being partly covered up with sand. He overtook his company and brought some of them back. The following is a memorandum and notice I made at the time and put up near the road."

Then follows a very minute description of the man, who had "eight or ten buckshot holes in his neck, and several stabs in his body, his neck broken, his head bruised as if struck by a gun barrel," and following this a detail of articles found in an abandoned camp near by, even to the detached buttons, etc. Over a hundred people witnessed the burial. This gives an idea of the number of emigrants then on the road. In one day the party passed thirty-two wagons, and during a short stop some five hundred passed them.

Mr. Haymond noted here a great number of graves, said to be those of persons who died of cholera in 1850, and those of others who died through drinking from a poisoned spring. On the twenty-fifth day out they threw away trunks and everything that could be spared, even shortening their wagon. They crossed the "Rockies" two months after starting. James Lamb then concluded to go to Oregon instead of California, and Creed Haymond agreed to accompany him. The party, "in peace and amity," divided the wagons, oxen and goods, but when, on July 10th, they came to where the road forked the two repented their decision and continued with the rest. The destinies of many people were affected by that decision.

On July 3d they came to a grave with the inscription, "Beal, shot by Bolsley, June 14, 1852;" and on July 5th to the grave of "Bolsley shot for the murder of Beal," of which affair this spirited account is given:

"He and Beal had a quarrel, in which Bolsley shot Beal. He was arrested and tried on the 13th, and condemned to be shot 'to-morrow at sunrise!' He spent the night in writing to his wife and parents. He had

been married fifteen months before and had one child. His family was in Kentucky. He dressed himself in his wedding suit, and at sunrise was led to execution. He knelt on his blanket. Twelve men fired at him at five paces—six guns blank charges and six ball. He gave the signal and six balls pierced his body, and he fell to rise no more. He said that the sentence was a just one and wrote his friends to that effect, and that he had been treated with every kindness; but that if it was to do over, he would kill Beal again."

These dismal incidents were, however, only episodes in a long experience made up of hard work, considerable privation and much danger—all met with the enthusiasm of youth.

It was not until they had been out ninety-six days that they received news from California, the first of which told of the nominations of Scott and Pierce for President, and "the affecting intelligence that the Hon. Henry Clay was no more." Clay was the idol of the young men of that day, and Mr. Haymond, on his visit to Fairmont, already mentioned, looked for a place on a stone step where he had, when a boy, scratched "H. Clay."

The hunting and fishing on this overland journey were excellent, as learned from the diary, Haymond killing a buffalo, a bear, and any number of deer and antelope. The Indians gave but little trouble, even the Sioux being mentioned as a friendly tribe.

Soon after arriving in this State, in 1852, being possessed of some means, he engaged in mining, packing, merchandising and ditching, on a large scale, in the northern part of Sierra county. For a year and a half he carried Wells, Fargo & Co.'s mails. Mr. T. H. Merry, in his story of "Sandy's Vindication," introduced Mr. Haymond, under the name of "Creath Hartland," as a mail rider and conductor of the saddle train, "who would fight at the drop of a hat, so that no one ever dared to stop the train or rob the express while he was in charge."

"The finest body of men ever gathered together in the world's history—men for the most part of wealth, social standing, education and great ability," is Mr. Haymond's opinion of his old associates, who came first to the mining regions of California. Time seems only to have intensified his admiration for them, and while appreciating the genius of Bret Harte he always regretted that his stories of California life were so out of drawing, and said that the unfavorable impression of Californians which they created abroad would not soon be effaced.

He continued in business until 1859, when he entered into the study and practice of the law with Hon. James A. Johnson, afterwards Lieutenant Governor of this State, and Judge Alexander W. Baldwin, afterwards United States District Judge of Nevada. In the legal profession his upward flight

was remarkable, carrying him to the highest point then achievable within the first year of his new life. The position thus early gained he has never lost. His reputation widened as time passed by, until it became more than national. His later arguments, especially, dealing as most of them do with the broadest questions of constitutional law, have engaged the study of lawyers and statesmen in every part of the world.

From the beginning, and for many years, he attracted attention by his success in criminal cases. One of the first and most interesting of these was the defense of Reagan, an excitable Irishman, who had killed an Englishman, in a quarrel caused by the latter cheering for Sayers, the English champion in the Heenan-Sayers prize fight. Leland Stanford, who had been Justice of the Peace at Forest Hill, and in whose court Reagan had been constable, was summoned, among others, to testify to Reagan's former good character.

The case of Milton Shepardson, charged with being an accessory in the robbery of Wells, Fargo & Co.'s Express, was one of our advocate's most notable successes. Shepardson had been convicted on the first trial. Mr. Haymond was then retained for the defense, and immediately appealed to the Supreme Court, which reversed the decision of the court below. The case was again tried, and Shepardson was a second time convicted. Another appeal to the Supreme Court was taken, and another reversal had. The excitement grew as matters proceeded, but upon the third trial the defendant was acquitted. The prosecution of Shepardson was unusually able. Detective Hume had worked up the case with the greatest care, and had gone over Shepardson's record for years in minutest detail. D. J. Murphy, now Judge of the Superior Court in San Francisco, was the attorney for the prosecution with Clay W. Taylor, District Attorney of Shasta county. Shepardson's previous reputation had been good, the best men of the county testifying in his behalf. One of the men, however, jointly charged with him, William Fugitt, turned state's evidence, and was pardoned, affording, as Mr. Haymond said in his argument, "perhaps the first instance in the history of criminal jurisprudence where the principal felon had been permitted to turn state's evidence, and had been discharged, in order that one who was confessedly neither present, participating in the crime, nor aiding nor abetting in its commission, might be convicted." Shepardson was afterwards arrested for a highway robbery in Oregon, and sent to the penitentiary, but Mr. Haymond never believed him guilty of the Shasta robbery.

Juries were hard to get in the "fifties." The troubles which preceded the formation of the San Francisco Vigilance Committee of 1856 were attributed to the unwillingness of business men to serve as jurors or fulfill any of their public duties. In a semi-humorous sketch, written for the *Record-Union*, Mr. Haymond described the method adopted by the Sheriff of Plumas county to secure a jury, a method which is not without advantages

of its own. As the gentleman who was then Sheriff is now living, and a man of some prominence, his name need not be mentioned; but the story is true in all essential particulars. Jacinto Aro, a Mexican, was charged with murder, and the Sheriff was ordered by the court to secure twenty-four jurors by the following morning. There was at that time a narrow bridge thrown across the Feather river, near Nelson's point. "In a curve, distant about half way between the mining town and the bridge, was an excellent spring, from which the miners in and around the town obtained the water used for culinary purposes. Once you passed this spring going north there was no way to leave the trail save by going on the bridge, or returning as you came." At this strategic point the Sheriff stationed himself and captured the first twenty-four men who came to the spring, and these were herded upon the bridge, at the other end of which a deputy stood guard. They were then marched, coatless and hatless, to the jail and locked up in a very small cell with the prisoner, excuses, bonds, and every other consideration, being set aside; all of which was done by the faithful Dogberry in the absolute belief that the orders of the court were paramount law. Aro was promptly convicted.

The murder of T. Wallace More, over a land dispute in San Buenaventura, is well remembered. More was a landowner of large wealth, who was assassinated at night while endeavoring to extinguish a fire in his barn which had been set by the assassins for the purpose of bringing him out of doors. The trial of Sprague, one of the defendants, was already well under way when Mr. Haymond was called into the case. Sprague was an erratic man, who, even when under sentence of death, seemed to be more concerned over the success of the Greenback party than about his own life. A man named Hickerson testified on his death-bed that Sprague confessed to him that he had murdered More; and Jones, another witness, gave evidence against him, but afterwards confessed that he had testified falsely. Sprague was the only one of the seven who was finally convicted, but he escaped with a sentence of imprisonment, and was after some years pardoned. Curlee, another of the defendants, was convicted on the first trial, but Mr. Haymond appealed his case and judgment was reversed. Curlee was finally acquitted. The trials were full of strange and exciting incidents, but none more striking than the unusual course adopted by Mr. Haymond in the case of one of the accused named Lord. It is usual to challenge a juror for having formed in a case an opinion which would interfere with the rendering of a just verdict. Mr. Haymond believed, however, that the only hope for his client was in the selection of an honest jury, and that no man in that county who said he had not heard of the case, and had not formed an opinion, could possibly be an honest man. Every one believed his client was guilty. He therefore challenged every man who pleaded ignorance or who said that he had *not*

formed an opinion. The jury stood eleven for acquittal, and Lord finally escaped punishment.

To submit a criminal case, where the evidence is strongly against the defendant, without argument, is as unexampled as the course taken in the case just mentioned. Yet, in one instance at least, the wisdom of it was proven. It was a case of forgery, in which Mr. Haymond was engaged for the defense. The prosecution was to open with Charles T. Jones, an able lawyer, and was to be closed by Jo Hamilton, at one time Attorney-General of the State, who had received a large retainer as assistant counsel for the prosecution. Mr. Haymond thought he had detected a hostile tone in the judge's rulings, and in every way matters looked black enough for his client. But when the opening argument was delivered he saw at once that the prosecution had reserved all its strength for the closing argument by Mr. Hamilton, for the empty vagueness of the opening was utterly unlike the thoroughness and force which usually marked Jones' efforts. Mr. Haymond therefore arose and said that if this was all the case the prosecution could make out, he would submit the case without argument. The prosecution was astounded; but there was nothing to be done. The court said, "Well, Mr. District Attorney, the State was entitled to the opening and the closing, but I agree if that is all the case the State has, the prisoner is not guilty."

In the Troy Dye case, one of the most surprising in our annals, Mr. Haymond defended Clark, who was accused as an accomplice, and delivered a remarkable appeal for mercy on behalf of Dye. The latter was accused of having conspired, while Public Administrator of Sacramento county, with Anderson and Lawton, to murder A. M. Tullis, a rich Sacramento valley landowner, and a bachelor. The theory of the prosecution, and which the verdict established, was that Dye accomplished the murder of Tullis for the deliberate purpose of securing, as Public Administrator, the administration of his estate. Dye had been a soldier during the war, was a man of family, and had not previously borne a bad reputation. The argument of Mr. Haymond, if we are to believe the Sacramento papers of that date, was so impressive, that had the decision depended upon the audience, Dye would have escaped the extreme penalty, but his attorney was "fighting for the one chance in ten thousand." Clark was acquitted; Dye and Anderson were hanged, while Lawton is still at large. This was at Sacramento in the year 1878.

Another remarkable case was the trial of Dudley Shepardson, brother of Milton Shepardson, already named, for the killing of John Arnold, who was at the time marshal of the town of Colusa. Shepardson had been District Attorney of Colusa county. During his imprisonment he was in the custody of D. H. Arnold, Sheriff of the county, who was a brother of the murdered man. Excitement was intense and great hostility was shown towards the defendant. After a trial covering a week, the jury returned a verdict of not guilty.

After a four weeks' struggle in the first Shepardson case, Mr. Haymond returned at once to Sacramento, and though he had not slept for over forty hours, met in argument, as counsel for the people in the mortgage tax cases, John B. Felton and Mr. Patterson, counsel for the Hibernia Bank. The sessions of the Supreme Court were extended far into the morning. Mr. Haymond's argument did not begin until eleven o'clock. Counsel on both sides were among the ablest on this coast, and the questions involved of great importance. At the close he was complimented by the judges and by the opposing counsel.

The leading civil cases conducted by Mr. Haymond have been very numerous, but to those which were the successes of his early practice there will always attach a peculiar interest. Richardson vs. McNulty was one of these, and Wiseman vs. McNulty another. The question as to what constituted an abandonment of a mining claim was settled by the decision in the first-named case. Uncertainty upon this question had been a fruitful source of contention in every mining camp. The other case named led to a definition of what would be a forfeiture of a mining claim in the eye of the law. California gave a new code of mining laws to the world, and Mr. Haymond's practice had much to do in establishing the interpretation of those laws. In the case of Hoagland vs. Sacramento, another of his successes, it was determined that the Legislature cannot create an obligation against a municipality and direct the levy of a tax for its payment.

He was attorney for the hydraulic miners in the first case brought against them by the farmers involving the debris question—that of Crumm vs. Spring Valley Mining Company of Cherokee. The trial was had before Judge Phil. W. Keyser and a jury at Oroville. Mr. Haymond won this suit, and it was the only case in a long series in which the miners were victorious, though scores of fortunes were spent in the litigation.

Most of Mr. Haymond's earlier legal associates and antagonists were much older than he. He has, therefore, though yet in middle life, survived a greater number than still remain in active service. Of those now living, the list embraces many familiar names, for instance William M. Stewart and James A. Johnson, with both of whom Mr. Haymond was once associated—the firm name being Stewart, Haymond & Johnson. Another of his early brethren at the Sierra county bar was Judge Alexander W. Baldwin, son of the more distinguished Judge Joseph G. Baldwin, and who is referred to in the chapter on the latter jurist.

Though Mr. Haymond may be said to belong, in the best sense, to the old school of lawyers, his mental trend is altogether progressive. He accepts the maxim, "A great lawyer should always be away ahead of the books."

Our subject has been called "the father of the Codes" of California. He was chairman of the Code Commission of this State, and, with his associates, prepared the first complete code of laws ever adopted by any State in the union, or, in fact, by any English speaking people. The Practice Acts, introduced by Judge Field early in the fifties, were derived from those of New York, but to this day New York has not adopted a Civil Code. A bill to accomplish this purpose has passed the Legislature several times, even as recently as 1888, but in each case a veto has prevented the adoption. Our Codes went into effect on January 1, 1873.

There were two other members of the Code Commission, J. C. Burch and Charles Lindley, the latter of whom resigned his position, but it was well understood that the work, which occupied nearly three years, was almost entirely done by Mr. Haymond, a great part of it being in his own handwriting. Those who have been brought in contact with him find no difficulty in realizing this. He possesses that capacity for mental effort which is said to be only another name for genius.

In reply to a political opponent who had depreciated the Codes Mr. Haymond said: "He does me much honor in the assertion that Creed Haymond made the Codes. They are the growth of the world's civilization." Incidentally, in the same speech, he gave information as to the adoption of the Codes which should be an interesting part of our State history. "Before their adoption," he said, "the Codes were submitted to an Advisory Board selected by Governors Haight and Booth, consisting of Charles A. Tuttle, of Placer, and Sidney L. Johnson, of San Francisco. Mr. Tuttle, a lawyer of learning and large experience—the reporter of the decisions of our Supreme Court (he died in 1887)—was particularly qualified for the position, and gave to the discharge of his duties on the Board his undivided attention. Mr. Johnson, a ripe scholar, learned both in the civil and common law, brought to his labors a mind rich in accomplishments, exact and critical. After a careful examination of the work they gave it their unqualified approval and indorsement and heartily recommended its adoption.

The Code of Civil Procedure and the Civil and Penal Codes were submitted before their adoption to a joint committee of the two houses of the legislature, composed of W. W. Pendegast, James T. Farley, James Van Ness, A. Comte, Jr, C. G. W. French and F. E. Spencer, who gave to these Codes a full examination, and in elaborate reports their approval and indorsement.

An extract from one of these reports is here given:

"Your committee believe that the system of law embodied in the Codes prepared by the Revision Commission is more perfect than that prepared by any other State; and it would be well for the honor of California if by the action of the present Legislature it should adopt this great work, thus setting an example which will be speedily followed by all her sister States, adding new laurels to the fame she has already justly acquired, and at once becoming, as has been remarked, not only a lawgiver to the thousands

within her borders, but to the millions who are to succeed them; and by force of her example, to not only the vast population of the Pacific Coast, but to the millions of citizens of other States, who will soon follow in her footsteps. Then, when the laws of all the States in this great federation are harmonious, and in sympathy with each other, California, having made the first advance towards this high aim, will be entitled to the first post of honor, and gratitude of the whole country."

Senator Edward Tompkins, who was Chairman of the Senate Judiciary Committee, one of the best lawyers of the State, said, on the passage of the Civil Code, the last of the four to be finished:

"As there will be no other opportunity, I desire to say a few words in relation to the bill now before the Senate and the work of the Commissioners of which this is the final result. Those Senators who were here two years ago will remember that I was not an advocate of the organization of the Code Commission. Past experience had taught me to believe that it was a dangerous experiment; and that the chances were that we would have as its fruits large salaries and expenses to pay, and then an added uncertainty rather than any definite rule to aid us afterward in the administration of justice. Having entertained these ideas I have watched the labors of the Commission with perhaps more interest, and certainly not with any stronger disposition to be pleased thereby, than would have otherwise been the case; and I desire now, in justice to the Commission and to myself, to say that I was entirely mistaken in the ideas that I entertained in relation to the organization of the Commission, and that on the contrary I now believe that they have done their work faithfully, wisely, and well, and that, although there will be errors to correct (doubtless some great ones, as who could do such a work and not leave traces of human infirmity behind them?), yet I believe, as a whole, it is the greatest and best step forward that the State of California ever has taken toward a perfect system of laws; and therefore, with as much earnestness and sincerity as two years ago I opposed this movement, I now second the motion, that the rules be suspended and the bill passed by the Senate without further delay."

(Edward Tompkins died in 1872. He had given to the State University real estate worth \$50,000, to found the Agassiz Professorship of Oriental Literature and Language—the first private endowment made to this university.)

The Commission appointed by the Governor to examine the work of the Code Commissioners, which consisted of Stephen J. Field, Jackson Temple, and John W. Dwinelle, spent months in the work. They said of it:

"We found the four Codes—the Political Code, Penal Code, the Civil Code, and the Code of Civil Procedure, as prepared by the Commissioners, and enacted by the Legislature, perfect in their analysis, admirable in their order and arrangements, and furnishing a complete Code of Laws; the first time, we believe, that such a result has been achieved by any of the Anglo-Saxon or British races. It seems inexplicable that those peoples who boast of being the most fully imbued with the sentiment of law have left their laws in the most confused condition, resting partly on tradition, but for the greater part scattered through thousands of volumes of books of statutes and reports, and thus practically inaccessible to the mass of the people. That California has been the first of this class to enact a complete Code of municipal law, will add, not only to the prosperity of her people, but redound to her honor as a State."

Although Mr. Haymond was willing to attribute the existence of the Codes to the growth of civilization, he had occasion, in defending the election

law, to say in public that his brain had conceived and his hand executed every line of that law, adding: "How many murders have been committed under the old law? how many men found bloody graves or a felon's cell? The election law of California makes election day the great Sunday of the whole year."

His opponents had accused him of drawing \$26,000 out of the treasury as salary, and he answered, with his usual frankness, that he thought they had underestimated the amount—though he had never taken the trouble to figure it up. As a matter of fact the State was not required to pay what it agreed to pay, as the Code Commissioners insisted upon paying the Advisory Committee \$15,000 out of their own salaries. A former Commission had made a complete failure of the work, and the commission which revised the federal statutes took nearly ten years to do one-fifth the amount of work which was accomplished by the Californians in less than four years.

The importance of this great undertaking was even better appreciated abroad than in this State—and by lawyers more than by laymen—just as the height of a mountain is better seen from a distance than from near its base. The distinguished David Dudley Field, whose own labors had especially fitted him to understand the value of the work of the Commission, at its completion telegraphed as follows:

TO MESSRS. HAYMOND, BURCH AND LINDLEY,

Revision Commissioners:

All honor to you for your great work accomplished. It will be the boast of California that, first of English speaking states, she has set the example of written laws as the necessary complement to a written constitution for a free people.

DAVID DUDLEY FIELD.

The California Code consists of the Civil Code, Code of Civil Procedure, Penal and Political Codes. The Civil Code contains 3,543 sections, and deals with the rights of persons and of things. The Code of Civil Procedure contains 2,104 sections, and deals with the organization of courts, with judicial and ministerial officers, and practice in the courts of justice of the state. The Penal Code contains 1,614 sections, and defines crimes and punishments, provides for proceedings in criminal cases, and establishes rules for state prisons and jails. For the three Codes mentioned, only, were there precedents; for the Political Code there were none. The Political Code comprises 4,105 sections, relating to the sovereignty and people of the State, and to the political rights of all its subjects, gives the political divisions of the State, defines the duties of all public officers, establishes election laws, laws relating to education, militia, public institutions, public ways, general police and property of the State, revenues and government of counties, cities and towns. This Code, covering almost every matter connected with the life of the State, *was passed by both houses of the Legislature without reading—*

an expression of confidence without example in the history of the world. More than sixteen years have passed since then, yet the people of California have never found reason to disapprove this action of their representatives.

While the commissioners were engaged in their work a deputation of Japanese officials visited the State, and on their return took with them copies of the Codes, portions of which were afterwards incorporated into the laws of Japan, and form a part of the broad legal and political reform which has culminated in constitutional liberty in that country. Letters of compliment and appreciation were addressed by the Japanese authorities to Mr. Haymond, and his friends remember two large and curiously beautiful porcelain vases, which were sent to him from the royal manufactory as a personal testimonial.

Mr. Haymond was for a long time colonel of the 1st Artillery Regiment, National Guard of California, but is now on the retired list. He was captain of the Sierra Greys, a Sierra county militia company, and took his command into service in the spring of 1860, under Col. Jack Hays, against the Indians of Nevada after the Pyramid Lake massacre. In this campaign against the Indians Captain Haymond was slightly wounded. Two severe battles were fought; one on the Truckee and the other on the Carson below Wadsworth. This broke the power of Chief Winnemucca. It was necessary to suppress these Indians, but Mr. Haymond felt that they had received the grossest provocation from the whites. He speaks approvingly of the good sense and humanity with which the Central Pacific people met the Indian difficulty from the first. They have never been troubled in any way by the Indians, and when the Southern Pacific was constructed it was thought that reports sent by the northern Indians had reached Arizona, for that road has had no trouble even there. Of this he says in one of his arguments:

"The situation in like respect was not less dangerous between the Sierra and Ogden. That country was infested with hostile Indian tribes, constantly at war with the whites. While this danger existed and had to be met, it was not by force of arms, but a treaty was made between the Central Pacific Company and these Indian tribes which has on each side been maintained from that day to this most faithfully.

"Many times since the construction of the road these tribes have been at war with the United States, but in no single instance have they ever violated that solemn treaty or injured a man connected with the railroad or a passenger borne upon its trains. The reverse is true as to the Union Pacific. It was built in the presence of an armed force, and its trains have since been destroyed by hostile tribes. The influence of the treaty between the Central Pacific and those Indian tribes was felt long years afterward, and still is felt, on the line of the Southern Pacific Railroad. The same obligations were impliedly entered into between the Apache Indians, the wildest tribe known to the continent, and the railroad company, and although that tribe has carried

murder and arson over the Territories of New Mexico and Arizona and the northern States of Mexico, yet in no single instance has it interfered with the trains of the Southern Pacific, or with the passengers, or with the section men, though repeatedly their war parties have crossed and recrossed the track."

Henry George, previous to the year 1870, was publishing a Democratic paper in Sacramento known as the *Reporter*. The questions evolved by the war were then uppermost in the public mind. Negro suffrage was, perhaps, the most prominent of these, and there was much loose writing and more empty talk, as to the effect in California, of the Civil Rights Act, in permitting negroes to vote. Mr. George called upon Mr. Haymond for an opinion on the subject. This the latter gave, in a communication, signing his own name. It was a cold, legal view of the case, but took what was necessarily the unpopular side. When the issue of the *Reporter* appeared, he was astonished to find his communication in the form of a double-leaded editorial. The effect on the circulation of the paper was disastrous; subscribers dropped off by hundreds. What would have been beneficial as an expression of individual opinion became well nigh fatal when given editorial sanction. The *Reporter* did not long survive, though its editor has since achieved wide celebrity.

Mr. Haymond has never been a seeker of office, but has given active assistance in every campaign to the cause he championed, and has always paid his expenses from his own purse, even refusing contributions that were collected by others for the purpose. He was appointed Tide Land Commissioner by Governor Haight, to settle questions as to the tide lands of San Francisco, but did not serve, and L. L. Bullock was appointed in his stead. He served two sessions in the State Senate, being elected in 1875 from Sacramento county. In that body he achieved distinction as a speaker and worker. He declined a renomination, after serving four years.

In speaking of his election one of our papers said:

"He reached the legislature as an independent man, by the aid of the votes of independent men. He talked over the heads of party nominating machines, and as a result the people listened and elected him. This is a method of election we delight to witness."

Land reform notions were at that time a most salient feature in politics. The Democrats had incorporated in their platform a strong anti-land-monopoly plank. Senator Haymond introduced a land reform resolution, the preamble to which was taken verbatim from the Democratic platform. The result was amusing and instructive. The resolution was rejected in the Senate by a vote of over two-thirds.

A fellow member of the legislature says of him: "He was the most exasperating debater I ever heard, yielding to no man in an argument; yet I

do not believe there was a man in Sacramento who was so universally liked. He was as genial, open-handed and open-hearted in private as he was aggressive in public." He had a fashion of driving an adversary over upon his own ground, in a simple, direct, yet forcible way. One of his friends remembers his appearance at a commission meeting, when it was thought that the chairman was financially interested in his own decision. The latter had complained of certain questions as being outrageous. The tone of wrath with which Mr. Haymond said: "Nothing, sir, is outrageous that will make you speak the truth!" left a deep impression upon all.

In 1877 the labor agitation, directed mainly against Chinese immigration, was at its height. It was a period of epidemic insanity. The riotous counsels of the sand lot were hardly more to be condemned than the unwise suggestions of those who opposed the agitation. The real status of the Chinese question was not clearly understood, even in California. There was great need of definite information. At the East the chief barrier to remedial legislation was ignorance as to the matter, and consequent indifference. Mr. Haymond was then in the State Senate. He met the difficulty by proposing the appointment of a Special Committee. The proposition was carried. The committee, composed of Creed Haymond (Chairman), E. J. Lewis, M. J. Donovan, Frank McCoppin, Geo. H. Rogers, Wm. M. Pierson, and Geo. S. Evans, met in San Francisco, and heard the testimony of a large number of persons, including many Chinese. The result was a report which covered the ground so completely that nothing of importance has been added since its issue. This report, five copies of which were sent to each Member of Congress, and thousands to other officers and persons who were thought to be in any way interested, had much to do with subsequent legislation by Congress. Accompanying the report was a memorial to the United States Senate, setting forth the case in brief, and offering among others the following suggestions:

"First—An appeal to the government of Great Britain to co-operate with our own government in the absolute prohibition of this trade in men and women; and

"Second—The joint and friendly action of the two countries with the Empire of China in the abrogation of all treaties between the three nations permitting the emigration of Chinese to the United States. And in the meantime we earnestly recommend legislation by Congress limiting the number of Chinese allowed to be landed from any vessel entering the ports of the United States to, say, not more than ten."

A bill embodying the latter plan, and known as the fifteen passenger bill, was vetoed by President Hayes; but all other legislation on the subject has been along lines suggested by the report of this committee, and was made possible by the change of sentiment which, in the East, followed the

clear statement of the case. With regard to this, Hon. A. A. Sargent, United States Senator, wrote:

DEAR SIR: I am very glad to understand that the Senatorial Commission intend to put in pamphlet form, and send East, the testimony which they took upon the subject of Chinese Immigration. This commission has done the most effective work ever accomplished upon this subject, and gave me the ammunition which I used in my speech upon the subject in the Senate, and which has done much to arouse the attention of senators and of thoughtful men in the East. I see the *Record-Union* says: "Senator Sargent is mistaken in expressing a wish for this document in a complete printed form." I don't see where the mistake comes in. At any rate, it is not pointed out in the article. The *Record-Union* also reiterates that my bill is unconstitutional, but does not indicate wherein the unconstitutionality exists. I suppose it is too much to expect the editor to know the law; but if he was at all conversant with the decisions of the Supreme Court, or the Circuit Courts of the United States, he would know that the doctrine is plainly avowed, in many well considered decisions, that a law passed subsequent to a treaty, and in conflict with a treaty, repeals the latter. In other words, the constitution makes treaties and laws enacted by Congress the supreme law of the land, and that which is passed last, be it either a treaty or a law, is declared by the Supreme Court to be the supreme law—supreme over the other.

Respectfully yours,

Hon. Creed Haymond, Sacramento, Cal.

A. A. SARGENT.

Creed Haymond and E. J. Lewis, of Tehama, were frequently brought into collision during debates in the Senate. Both men stood conspicuously above the rest in eloquence and ability, and it was proposed by some of the papers that they should head opposing tickets in a canvass for the governorship. Lewis was ambitious to be considered the leader of the Democratic party, but failed, owing to strong newspaper opposition. In speaking of his antagonist in later years, and of their parliamentary duels, Mr. Haymond said: "Lewis was an admirable man, but he would get angry sometimes."

Our system of irrigation owes its origin to Mr. Haymond. The early years of his life in this State had been spent in the mining districts, and he thus became familiar with questions arising under the mining laws. He could even then foresee the evils to result from hydraulic mining, and the trouble that would be caused by the filling of streams and destruction of agricultural lands. During the first session of the legislature to which he was elected he introduced a bill in the Senate, the theory of which was to combine a system of irrigation and storage which would prevent the debris from the mines coming down on the valleys. The ideas involved in the bill, though crude from an engineer's point of view, grew out of the knowledge that immense dams could be built across streams like the Feather and Yuba, behind which tailings could be impounded, while the water could also be distributed through ditches and iron pipes for purposes of irrigation.

He believed that when the dams were full, water charged with debris could be piped and flumed upon the tule and low lands. Thus would be

accomplished three important results: 1st, protection of the lands exposed to destruction by debris; 2d, irrigation; 3d, reclamation.

The miners at that time did not see the danger ahead, and therefore objected to any legislation upon the subject. Mr. Haymond, knowing what was coming, desired, before any excitement arose, to provide against further injury being done to agricultural lands, and also to enable the miners to work their claims without fear of the courts. The mining interests were so strongly opposed to any legislation whatever on this subject, that he had to abandon that portion of the bill, and confine it simply to a system of irrigation, formation of districts, etc. During the next session of the legislature, 1877-79, he was placed on the Irrigation Committee, and requested that he should be placed on no other, in order that he might give his whole time and attention to the subject. After further study of the matter he abandoned many of the features of the first bill, and introduced another. He came into contact with Colonel Mendell, the distinguished engineer, and Wm. Ham Hall, and with them eventually formulated a bill, tentative in its character and looking to further investigation, with additional legislative action to follow after that investigation had been made.

The newspaper files of 1875 to 1878 reveal Mr. Haymond as the senatorial leader of that time. One editor, speaking of a then recent debate in which our subject had shown more than his usual ability, made it a text in drawing a comparison between English methods and our own, which was not favorable to us. The publicity which is given to the speeches of English statesmen stimulates them to care and a sense of personal responsibility for their utterances, while in American legislative bodies most of this is lost. There is, said this editor, little encouragement from this source for men of Mr. Haymond's ability, though their speeches be as epigrammatical, logical and forcible as his usually are.

He strongly opposed the substitution of the new constitution for the old, and foretold the difficulties that have since arisen over tax questions. Speaking of his opposition to the constitution of 1879 he said, in a speech at Sacramento in 1884: "A few years ago I stood on this very spot—before I had any connection with the railroad company—and told you that if the new constitution should be adopted there would be no way to force the railroads to pay any taxes, unless, to use their own words, they were minded to do so. And you have seen the result. There is no law to-day under which railroad taxes can be collected, for the new constitution does not provide a legal method. And yet in these six years the Central Pacific folks have paid, voluntarily, to the State no less than \$3,600,000 in taxes."

In 1880 Mr. Haymond was sent to the Republican National Convention which nominated Garfield. During the discussion which arose over the disputed Illinois delegation, he, as a member of the committee on credentials,

was brought into collision with General Logan, who was disposed to browbeat "the little Californian." The discussion hinged on the unit rule. Delegates had been chosen by State and by district conventions. Grant's nomination depended upon the admission of a sufficient number of State delegates, and the acceptance, by the committee, of the credentials of a number of district delegations changed the complexion of the vote, and gave the nomination to Garfield.

In this and following debates Mr. Haymond showed himself the most ready speaker in the convention, and one whom no opposition could quell. The *Chicago Tribune* said of him: "There is always a surprise in every large assembly, and Creed Haymond, of California, constituted the surprise of yesterday. He had all the facts of the Illinois case in his mind, and thoroughly digested them." It also said that he "poured hot shot" into his opponents, and yet won the sympathy and admiration of both audience and convention, and though his speech "bristled with sharp points, he made them in the most admirable temper." "Logan is too apt to confound himself with the State of Illinois," was a sally which touched off a weakness of the great man, and was received with terrific cheering. This point in Mr. Haymond's speech formed a part of the report of the credentials committee.

After his return in the summer of 1888, from Washington, where he had been engaged in the Pacific R. R. tax case before the Supreme Court of the United States, and had appeared in argument before the Select Committee of the Senate on Pacific Railroads, he was again nominated to the Republican National Convention, to meet that year in Chicago. Though ill and travel-worn, he attended the convention, against the advice of his friends and the commands of his physician. The result nearly proved fatal, for on his way home he was taken ill in Colorado, and lay helpless for nearly two weeks.

As chairman of his delegation he was described as the "most impressive figure" in the Chicago Convention of 1888. Captain King, of the United States Army, author of "Captain Santa Claus," and other stories of great literary merit, wrote in an enthusiastic way of Colonel Haymond, noticing particularly his "military bearing." So great was the influence of the Californians under his lead, that Blaine, their candidate, would have been nominated without a doubt had not Blaine himself forbidden it. The convention adjourned over Sunday, the Californians voting for adjournment in consequence of a forged assurance that the New York delegation favored it. On Sunday night a caucus of Blaine members was held, at which about 500 votes were represented. Mr. Haymond was chairman of the caucus, and John S. Wise, of Virginia, Secretary. Blaine's dispatch to Boutelle, however, read on Monday morning, interdicted his nomination. The vote of California was then given to Harrison—whose candidacy Blaine strongly favored—which was the signal for Harrison's immediate nomination. The position of the Californians at the head of the roll call gave added

effect to any change they might begin. The New York *Tribune* clearly perceived the importance of California in the fight, and thus spoke of it: "This was the crisis of the convention. Harrison and Sherman were almost exactly on a level. The nomination must go to one or the other. The Blaine element in the convention felt more friendly to Harrison than to Sherman, for many reasons. It was well known that the New York delegation, the moment it became apparent that Harrison could not be nominated, would swing its seventy-two votes to Sherman; that Wisconsin and other States would follow suit, and that Sherman would be nominated. The time had come to strike, and California, which had cast its sixteen votes solidly for Blaine for six ballots, began."

Serious strategic mistakes were made by the friends of Blaine. The desire to honor favorite sons led the delegations of several States to ask that California should pass the nomination on the first ballot. This was done in spite of the wishes of Mr. Haymond, who was in favor of nominating Blaine at the start, and some fear was expressed that he would adhere to this course in spite of the will of the delegation, and announce the vote for Blaine. The Massachusetts delegates, two-thirds of whom were with the Californians, were impressed with the importance of the nomination coming from New York. This led to the adjournment over Sunday, which undoubtedly proved fatal to Blaine's nomination.

Boutelle, in his remarks preceding the announcement of Blaine's dispatches from Edinburg, found it necessary to apologize to the California delegation for what he was about to do. He began, "I find myself somewhat embarrassed in being thrown into even a semblance of antagonism to the representative of the delegation from the great Pacific slope." The New York *World*, in describing what followed, said: "It was like a Druid that Creed Haymond of California looked, when, holding with one hand to the standard of his State, he thundered forth that California would not take 'no' for an answer! * * Every syllable, every word was spoken by itself, and the audience lost its breath at the tenacity of the bold men from the Pacific."

After the nominations had been made, Mr. Fessenden of Connecticut, suggested, as a pertinent inquiry, "whether there was anything else the Californians wanted. If not, the convention would adjourn."

Mr. Haymond himself received a vote from Texas for President.

Chauncey M. Depew, of New York, then called for three cheers for Colonel Haymond. They were the first cheers that had been demanded, and being given, the honored Californian responded as follows:

"While my heart is overflowing with happiness that we have made a nomination in harmony, yet before I speak of that I should not forget to pay tribute to the ladies of Chicago. They are pleased to send to this lonely California delegation a tribute of flowers; flowers as bright as their own dear eyes, and as pure as their loyal hearts.

(Applause.) There was a difference of opinion in this convention as to whether a soldier or a statesman should lead this grand party to its grand victory. We have solved that problem, and have given you a man who combines the wisdom of the statesman and the gallantry of the soldier. No man can hear his name mentioned without the thought rushing upon him that we hold these truths to be self-evident, that all men are endowed by their Creator with certain inalienable rights, among which are the rights to life, liberty and the pursuit of happiness. His great-grandfather signed that magnificent Declaration and this Republican party gave a million of soldiers and their blood to consecrate it, and at last set these words in the Constitution of the United States, as an assurance to all; that if in this land any man invade any of those rights, whether belonging to the humblest or the highest, 60,000,000 of the grandest race of people that this world has ever seen will spring to their defense."

Mr. Haymond did not go to Indianapolis after the nomination, being too ill, and knowing the serious work to be over; but the local papers nevertheless not only included his name among the visiting delegates, but gave an address in full, which they credited to him.

In 1881 began a new phase of Mr. Haymond's professional career. The first important revenue case under the constitution then recently adopted came into his charge, and, at the request of Leland Stanford, he made an argument before the Supreme Court of California in support of the amendments of 1884, which provided that if the property of a corporation was taxed its stock could not be. At this time it is not easy to understand the condition of public feeling which brought into existence the constitution of 1879 and which lingered for some years after the adoption of that instrument. Reaction was mistaken for reform, and an effort was made, among other things, to tax the shadows as well as the substance by claiming that the constitution gave authority for taxing certificates of stock, etc.

The question came up for trial under the title of *Burke vs. Badlam* as Assessor, the petitioner asking for a writ of mandate commanding the Assessor to assess certain shares of stock in corporations, and also certain deposits made by about 10,000 depositors in the Savings Union Society. There was great anxiety among shareholders and bank depositors. Mr. Haymond's argument in this case has never been answered. It is rich in classic passages. In concluding he says, "It is only where the laws are written in English that the natural rights of men are acknowledged and protected. There alone these rights, hallowed by the memories of the past, bound up in the hopes of the future and guarded by a warlike race, give to life, liberty and property the sanctions which place happiness within the reach of all. That an absolute, arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, is the grand central idea of American Liberty."

After the decision in this case Mr. Haymond devoted himself with characteristic energy to the further study of tax questions.

Later in the same year the Central Pacific Railroad Company tendered Creed Haymond the position of Associate Solicitor of that company. The constitution then just adopted by the State of California (1879) contained other provisions than those above stated, in its revenue system, to which the railroad companies of the State objected; and after two years of expensive litigation, during which the corporations suffered continued defeat, and were no nearer to establishing their rights—with public opinion, even among friends, aroused against them—Mr. Haymond stepped into the important position to which he was called, and assumed the special care and management of tax matters.

Without taking anything for granted, he began a careful study of the cases, and, when this was completed, he had formulated in his mind a clear-cut method of procedure that he believed would necessarily result in complete justification of the position of the railroad company.

Up to the time of his entering into these cases as the attorney for the railroad company, the contests coming up from time to time had been mere skirmishes, and were fought upon what he discovered were minor points, and mainly on technical grounds. A study of the cases revealed to him that, underlying all the purely technical and stereotyped modes of procedure, were broad constitutional questions; questions going to the very essence of our government; questions which the Supreme Court declared to be of the "greatest magnitude and importance, and which concern not only corporations in this State, but all corporations in the United States," the determination of which has made it necessary to revise every American work on constitutional law.

Mr. Haymond found that property owned by railroads and other *quasi* public corporations was assessed and taxed in a way different from that in which like property owned by persons or corporations not *quasi* public was assessed and taxed. He found that, in the cases of the Central Pacific and Southern Pacific Railroad Companies, the corporations were operating under franchises granted by the Federal Government, and that the State was taxing those franchises at from five to ten millions of dollars annually. When suits were brought in the State Courts on behalf of the State against the corporations for the recovery of the taxes claimed to be due, Mr. Haymond had them removed, under the Act, to the Federal Court; and there claimed that a corporation was a person within the meaning of the 14th Amendment to the constitution of the United States, and for the first time in history invoked the protection of that amendment for a client in the matter of unequal and discriminative taxation.

This was a startling proposition. It was something new. To the common mind the repetition of an idea is sometimes apt to weaken its force, as though its frequent assertion in some way made it less true. We have

been so accustomed to hear about the principles of the Declaration of Independence, that we forget that they are living principles, and have predominant power, even when not visibly embodied in our national constitution.

The Fourteenth Amendment, it had been said, was meant for the negro in the South. No one but a bold thinker could have advanced the proposition, that it also applied to the taxation of corporations, but Mr. Haymond did so, against the advice of his elders, and then bent all his energy toward maintaining his position, for in a sense his reputation was at stake. The matter resulted in much official correspondence, and endless newspaper discussion. When even the Attorney-General and State Controller, in a public document, accused his clients of arrogance and lawlessness, it is not surprising that popular feeling seemed to be hostile to the companies named. Mr. Haymond replied: "The citizens of this country who own this property were reared in another school. They have been taught by a brave and hardy ancestry that to resist an illegal tax is to obey the laws of the country."

In a recent address at Platt's Hall he spoke of the Fourteenth Amendment as the "apex and glorious crown" of the edifice of human liberty, and in his argument before the Circuit Court, he said:

"I am not here to claim, nor, indeed is it necessary to do so, that the men who framed the Fourteenth Amendment to the Federal Constitution, at that moment thought how far-reaching in its effects it was to be, or how great and important were the rights which in the future it would secure to this people. That they builded better than they knew, may be conceded without detracting from their merits. The young men of the Colonies who met in Philadelphia, and in the enthusiasm of youth threw down the gage of battle to the greatest Empire the world, up to that time, had ever seen, declared these truths to be self-evident: 'that all men are created equal;' that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; that when any form of government becomes destructive of these ends it is the right of the people to alter or abolish it, and to institute new government; laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness.

"As long as the words of that declaration shall be remembered—as long as love of liberty and free institutions exists—as long as the Government which those men launched upon the sea of empire continues, it must be held by Courts that all lawful legislation, constitutional or otherwise, is to the end that these inalienable rights shall be secured; and yet, may it please the Court, we have listened for many days to arguments on behalf of the plaintiffs to establish the fact that not only has the State the power to deprive persons of these rights, but that it would be improper to construe the Federal Constitution to prevent the exercise of such power on the part of a State. I have thought that it was strange that such arguments should be made at the close of the nineteenth century by the descendants of those who, at the close of the eighteenth, had declared that it was impossible that any Government should justly exercise such power."

The United States Circuit Court, in an opinion remarkable for its deep learning, affirmed the stand taken by Mr. Haymond, and held that a corporation was a person under the Fourteenth Amendment, and that the taxing system of California, as applied to railroads operated in more than one county in the State, was in violation of that provision of the constitution. Mr. Haymond was, however, overruled in this tribunal on the question of the taxation of the franchise itself.

These cases were taken to the United States Supreme Court, and in rendering the opinion of that court the Chief Justice said:

"The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the constitution which forbids a State to deny to any person within its jurisdiction the equal protection of the law applies to these corporations. We are all of opinion that it does."

The lower court was overruled as to the taxing of the franchise; it was held to be federal, and not taxable by the State. As to the question whether the constitution of California is in violation of the Fourteenth Amendment, the Supreme Court has not rendered an opinion as yet, but the highest courts of several States and other Circuit Courts, following the California Circuit Court, have affirmed the stand taken by Mr. Haymond, and the time is not far distant when this question will come up for final determination.

From many passages in this great argument, which exhibit the force, clearness and the brilliancy of Colonel Haymond's style, even when dealing with matters purely legal, the following may be selected:

"From the time of the establishment by James II of the 'High Commission' to the time of the creation of the State Board of Equalization of California, no tribunal has existed either in England or America, which *ever claimed* the right to deal with life, liberty or property subject to no rules except those of its own pleasure and changeable at its own will.

"It becomes this court to pause before giving ear to the monstrous pretensions of the State Board of Equalization, voiced by the Attorney General and upheld by the Supreme Court of California. Nearly two centuries have elapsed since the unlimited power to deprive the citizen of property, except in accordance with the law of the land, has been asserted in any country where the English language prevails. It is historical that the High Commission dared not enforce its judgments against property, because an attempt to do so would enable the party injured to invoke the jurisdiction of the common law courts; that the Solicitor General shrank from facing such a court, *packed even though it was* with a claim that the 'High Commission,' in passing upon property rights, 'could make rules for its own government, change such rules as often as it saw fit, and adopt a new rule for each case if it desired so to do.'" * * * * *

"Let me impress upon this court that the validity of a tribunal to pass upon laws which divest one of life, liberty or property is not to be determined by the fact that justice is the result at which the tribunal is directed to arrive or is the declared purpose of the law.

"No tribunal has ever been established, no laws have ever been enacted in a civilized country, no matter how arbitrary were the powers to be exercised or how flagrant

were the acts to be done under the laws, but the end of each was declared to be the promotion of justice.

"The barbarous clauses of the Missouri constitution, which made outlaws of ministers of Christ because, in obedience to the ordinances of their Master, they had sympathized with persons supposed to be guilty of political crimes, were enacted in the name of patriotism." * * *

"In expounding the relations which the means, instruments and agencies of the general government bear to the States, a splendor of eloquence and of argument seldom, if ever, surpassed, has been supplemented by judgments pronounced by the most illustrious of the line of great judges who have adorned the American bench. In the investigation before us there are no strange waters to be traversed or new lands to be explored. The courses have been laid, the paths marked, and if we but follow them no mistake can be made."

To quote further:

"There was never any reason in this country, under our form of government, why anybody should be authorized to acquire property of any kind." * * * The Federal Constitution, "as well as all of our State constitutions, never gave any right to the people of the United States to acquire property, or to enjoy life, liberty or property. These rights were declared in the very beginning to exist independent of all constitutions and laws. * * *

"It is true that up to the time of the adoption of the Fourteenth Amendment, a State, acting by the concurrence of all the departments of government—by the concurrence of the judiciary, the legislative, and executive departments—might deprive a person of life, liberty and property, and that there was no remedy. The right of the slave to his liberty in this country was no greater or more sacred after the emancipation proclamation and the adoption of these amendments than it was before; yet at one time he was deprived of that liberty by the action of almost every State in the Union."

The change in the relation of the State to the Federal Government which was affirmed by the adoption of the Fourteenth Amendment was very tersely and clearly expressed:

"The difficulty was, before the adoption of the Fourteenth Amendment, that we had no remedy against the action of the State. The Federal Government, if Mr. Chief Justice Waite was despoiled of his property in England, would right him, even if it had to wage a war, but against a State which had despoiled him of his property he had no remedy. Now, whenever the right to life, liberty or property is invaded by a State, or when any person is denied the equal protection of the law, the Fourteenth Amendment applies. It matters not under what power the State assumes to act, for the protection runs against all power and in favor of rights which cannot be invaded by the State under any circumstances or upon any pretext whatever."

And in showing the application of this change to the power of taxation he altered the amendment—an *argumentum ad absurdum*—so that it read: "Nor shall any State deprive any person of his property without due process of law, *except it be in the form of taxation*, nor deny to any person within its jurisdiction the equal protection of the laws, *except it be by taxation*." This was embodied in the opinion of Justice Field in the Santa Clara case.

In the argument before the Senate committee occurred this passage:

"Good character and reputation make up the best property which can be held. They oftentimes constitute the only defense a man can make when assailed. The law recognizes that good character, when thrown into the scale in the administration of justice, is often potent enough to overcome the strongest circumstantial evidence and to establish innocence when the beam would otherwise incline toward guilt. At least, under all circumstances and at all times, a well spent life arms the man with a shield which justly protects him from the shafts which envy or malice may speed."

One of the masterpieces of Creed Haymond's later life is the argument already spoken of in this chapter, delivered before the Select Committee of the U. S. Senate on Pacific Railroads, at Washington.

For three days, without notes, extemporaneously, dealing with facts running through twenty-seven years, with figures reaching into the millions, with all the intricacies of the business relations between the Central Pacific Railroad and the United States Government during all that period, the whole covered by an exposition of the legal relations between the corporation and the State, Mr. Haymond delivered what will ever remain the accepted history of the Central Pacific Railroad.

In opening he said:

"Two honorable men may, after having made a contract with each other, differ as to its construction, and they may with propriety sit down together and discuss matters and attempt to reconcile their differences. If they cannot reach an amicable adjustment, they may refer the matter to arbitration or to the courts. If, in addition to differences of opinion, one should charge the other with having violated the rules which are recognized by civilized men as governing the relations between honest people, then so long as these charges were insisted upon, settlement made upon a moneyed basis between the two would be dishonorable to both."

In discussing some of the difficulties to be overcome in building the overland railroad, Mr. Haymond said:

"From the summit of the Sierra these venturesome men looked down upon Donner Lake, 1,200 feet below; from the west they must overcome an ascent of 7,000 feet in eighty-three miles through a broken and distorted country. To the north of Donner the descent was a precipice; to the south, solid walls of granite rose almost abruptly from the lake 3,000 feet, and clinging to the sides of this precipice, winding in and out its indentations, passing under its projecting points, piercing its sides with costly tunnels, the road must descend if built at all. The world pronounced it impracticable, and had these men when they first gazed upon it, been trained railroad builders, they would have assented to that judgment. But they were not railroad builders. They were in the morning of their lives; they were numbered among the adventurous pioneers of the State, and with them enthusiasm took the place of judgment. They embarked upon the desperate undertaking, and to its success pledged their fortunes, ventured their lives, and, against the combined judgment of the world, triumphed."

And again in another place in the same argument he draws the following picture:

"It is said by the Commissioners, and reiterated by the President, that the Pacific railroad should be divorced from the Government. Living upon the confines of civilization, as I have for nearly a quarter of a century, I have frequently seen husband and wife freed, so far as the law is concerned, from the bonds which held them together. I have seen husband and wife united when the wife was the stronger, when she brought the wealth of woman's love and the support which alone that can give. I have seen the spouses go through life, the wife devoted to domestic affairs, the husband mixing with the world, until the man, educated by contact with superior minds, advanced, while the woman, devoted to household and wifely duties, lagged behind. I have seen the time come when the man, by reason of these facts, desired a separation; but never, in all my experience, have I known a man so low, so base, that when it came to the moment of separation he desired to take from her who had stood by him when she was strong and he was weak, the home in which their children were born, or to strip her of the good name and honor which her virtues deserved.

Much has been said recently of the defenceless condition of the Pacific Coast. In speaking to another point, Mr. Haymond thus adverted to this subject:

"We have constructed now—and I say 'we' because we finished that Oregon road—a line of road from Portland, Oregon, extending south through the whole length of Oregon and California to Yuma, on the Colorado river. That line runs behind a range of mountains its whole length. There are only three places on the coast, though it is as long, I believe, as from the northern part of Maine to the southern part of Georgia, at which an army could be landed at all, which would be Portland, San Francisco, and Wilmington harbor. From San Diego an army could never march in. There is a line of road running parallel to the coast, distant forty or fifty miles from it, that could never be reached by a hostile force. It is supported by three or four lines of transcontinental roads. An army stationed along these lines could be concentrated at any point on the line within thirty-six hours. San Francisco is one of the commercial cities of the world that is built upon the ocean, and with guns that will reach five or six miles, its defense must depend, in the main, upon a fleet. The fortifications would, of course, support that fleet. San Francisco might fall, or might be blockaded, but as a strategic point it would be of no value, and the Pacific Coast, since these days of railroads, could only be successfully blockaded by blockading the whole Atlantic coast.

"There is no such defensive line on earth as that. England proposed once to build a line around the island, but it could have been reached from a thousand places and broken. Ours can only be reached from three places. No hostile army could ever be transported, with any means of transportation now known, which could reach that line. The road then stretches along the frontier of Mexico until we get clear down to the Rio Grande, and makes what General Sherman calls the southern picket-line of the United States."

The Pacific Railroad would have secured to the United States the enormous trade of the orient, had it not been for the completion of the Suez Canal. The projectors of the road had hoped to secure this trade, and in speaking of this hope Colonel Haymond takes the occasion to contrast the treatment received by De Lesseps from his countrymen, and that which was at first accorded to the builders of the Central Pacific:

"That all of those dreams have not now turned into realities, and all of the commerce of that mighty east has not been given to us, rests not upon things left undone by this people, but upon the fact that a great Frenchman with a bold hand reopened the ancient canal and shortened, by thousands of miles, the water line from Asia. De Lesseps spent in that work countless millions, and has taken in honor all of the rewards which a grateful country could upon him bestow. No legislative committee has investigated him; no strange commission, clothed with inquisitorial powers and functions unknown to the traditions of English speaking people, has been called to render judgment upon him; no keen lawyer, the advocate of the French government, has sat in his elegant office in Paris and computed how many tons of sand De Lesseps dug from the desert, nor how many drops of sweat he poured out under a tropical sun in that achievement."

This bit of antithesis is almost equaled by his more extended response to the Board of Trade of San Francisco, which had opposed the Ocean Shore railroad franchise. In this he contrasted in detail the shortcomings of the Board of Trade with the energy and public achievements of the men it was attacking.

His argument before the Supreme Court, and that before the Senate Select Committee, though covering in book form nearly four hundred pages, were both telegraphed in full and published in several of our papers.

That the principles set forth in the Bill of Rights, and the Declaration which came two years later, are still living and potential is apt to be forgotten, even by those who give such matters some little thought. In his Platt's Hall speech, in the gubernatorial campaign of 1886, Mr. Haymond denounced the Extradition treaty negotiated by the national administration with England as subversive of those principles. In comparing the proposed treaty with the treaty of 1842, he said, among other things:

"This is as important a question as ever came before an American audience, and should be deliberately considered, because, if you adopt this treaty, you reverse the policy not only of this Republic, but of every civilized nation. This is the pending treaty before the Senate: 'Any person guilty of malicious destruction of property which may—not which will, nor which was intended to endanger, but which *may* endanger the lives of others, and which is in *either* country made a crime by law, shall be extradited on demand of the power whose laws are violated.'

"Under the old treaty, a person charged with crime, and fleeing from England to the United States, could not be extradited—that is, returned to England to be tried for the crime—unless the offense charged was recognized as a crime in both countries. * * * Rebellion against the English government is a crime which may be punished with death in England; it is a crime recognized under the laws of England; but rebellion in England is not a crime recognized by the laws of this country; and the fugitive, if he finds his way within our jurisdiction, may be safe from all the consequences of his act. The English government differs from ours in this: that it is based upon the divine right of kings, while ours is founded upon the right of the people to rise and revolutionize and change their form of government when it becomes oppressive. They have certain political crimes which are severely punished in England, and the crime of high treason is one of these. While in America it can only be committed

by levying war, in England it may be committed by imagining or attempting to compass the death of a king.

He then quoted from the statute of King George which "makes the destruction of any of his majesty's ships of war, whether built or repairing, or any of the king's arsenals, magazines, dock-yards, rope-yards, or victualing stores or ammunition, or causing, aiding, procuring, abetting or assisting in such offense," felonies without the benefit of clergy.

"Under the old treaty, if any of these acts had been committed in an attempt to establish a free government in Ireland, the party committing the act, if he fled to the United States, could not be extradited, and why? Because such an act is not recognized as a crime in America." The act of rebellion against the British government, if committed within the territorial jurisdiction of Great Britain, cannot be a crime in the United States, nor can any person who commits it be taken from our jurisdiction, if he should reach it."

Mr. Haymond further denounced the proposed treaty as voluntarily giving up rights similar to those for the recognition of which the American colonies had fought the war for independence, for though the colonies were then admitted to be a part of the mother country, in their Bill of Rights they declared, as one of the causes of protest, that "Parliament had resolved that, by force of a statute made in the thirty-fifth year of the reign of King Henry the Eighth, colonists may be transported to England and tried there upon accusations for treason, misprisions or concealments of treason committed in the colonies."

The ratification of this proposed treaty was finally defeated in the Senate of 1888.

When the Interstate Commerce act was passed by Congress, in February, 1887, the gravest forebodings were expressed as to its probable effect upon the prosperity of the country. It was pronounced the most important measure since the emancipation proclamation, and its complexities have produced a literature so extensive that we may some day have interstate commerce lawyers, just as we now have patent lawyers. The effect of the "long and short haul" clause, Section 4, upon San Francisco, and terminal points generally, it was thought, would be little short of disastrous, and great uneasiness was felt among merchants and others having business with the roads. The members of the Commission to whose charge the interpretation of the act was entrusted admitted that no feature in the act had caused them more perplexity than the application of this clause, which provided that no common carrier "shall charge or receive any greater compensation in the aggregate for the transportation of passengers, or like kind of property, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance," the words in italic having been inserted as an amendment to the Reagan bill. The

commissioners were given discretion in the application of this clause, and conflicting interpretations were received from all parts of the country. Mr. Haymond delivered one of the earliest opinions, a few days after the passage of the act. This opinion is elaborate, and is a fine example of clear English. It was in conflict with the expressed views of some of the best lawyers in the country. He took the ground that the adoption of the amendment adding the words "under substantially similar circumstances and conditions" brought the act back to the rule of the common law, that all must be treated substantially alike, the circumstances being the same. To quote :

"The right of the common carrier to a reasonable compensation has always been admitted at common law. It is a property right, and, like other property rights, it is protected by the national constitution against assaults either by the national or State government. The act of Congress under consideration clearly recognizes this right by the declaration in the first section of the act that the charges for such service shall be 'reasonable and just.' In construing the act this recognition of the carriers' right must always be borne in mind, for every part of this act must be read in view of this fact, and no intent can be deduced from it which would necessarily impute to the national Legislature an attempt to destroy property rights."

Competition by water would necessarily destroy such rights, if the roads were forbidden to meet such competition by reduced rates. Mr. Haymond claimed that such competition was one, among other things, which prevented the "circumstances and conditions" from being similar, and therefore that the matter was reduced to the question whether the charges were just and reasonable under all the circumstances.

He said, "I am of the opinion that under the act in question there is no absolute prohibition against charging more for a short than for a long haul in the same direction, the shorter being included in the longer distance. The leading question will always be whether the rate charged is just and reasonable and made without any undue or unjust discriminations against any person or locality or without unreasonable preference or advantage in favor of any person or locality."

This view was sustained by the Interstate Commerce Commission, in one of its earliest decisions—the Louisville and Nashville Road case—Judge Cooley writing the opinion. It also decided that a corporation need not wait for a decision of the commission, but that the burden of proof and responsibility of anticipating it rested upon the company.

Immediately upon his coming into the service of the Central Pacific Railroad, a strong attachment sprang up between Mr. Haymond and Governor Stanford. He was the latter's private counsel, and arranged all the papers in the matter of that gentleman's munificent donation to the State for the foundation of a great university.

In 1883 he went to Europe to secure Governor Stanford's deposition in the Colton case, spending the 4th of July on shipboard. Mr. Haymond was set down on the programme for the oration of the day. "And a brilliant oration it was," says a friend writing of it afterwards. Mr. Haymond's rela-

tions to Governor Stanford and the object of his European visit are better described in the words of the latter in his deposition. In reply to the interrogatory, "Since you arrived in Europe has any one talked to you about your evidence in this case," etc., he said:

"Since my arrival in Europe I have talked with Mr. Creed Haymond, who for about three years past has been associate counsel to the Central Pacific Railroad Company, and who during the same period has been counsel to me and has chiefly attended to my private business. The condition of my health is such that I deemed it prudent to advise him as my confidential attorney fully as to all my affairs, and in the conversations had with him I have done so to the extent of my ability."

The name of Mr. Haymond will always be linked to that of the Leland Stanford Jr. University. He, with Governor Stanford, drew the act and formulated the provisions under which this University was to be founded and perpetuated, and to him was assigned the preparation of the Articles of Endowment signed by Leland Stanford and his wife, whereby their immense fortune was bequeathed to the cause of education.

In speaking of this endowment Mr. Haymond once said:

"Bereft by death of the son and support of his household, with age coming on, richly did he repay the favors which his adopted State and its citizens had showered upon him. Possessed, as he was, of immense tracts of land lying in the fertile valley of the Sacramento, of others at Palo Alto, south of San Francisco; of bonds and stocks, horses and cattle; of life and energy for the future; with one stroke of the pen, after making an allowance which a decent respect for the opinion of mankind required him to make for his immediate relatives and friends, he gave all he had—all he might hereafter acquire—his property, his marvelous executive ability, to the foundation and endowment of a university on the peninsula of San Francisco. The declared purpose of that university—endowed as no other has ever been—was to 'promote the public welfare by exercising an influence in behalf of humanity and civilization, teaching the blessings of liberty regulated by law, and inculcating a love and reverence for the great principles of government as derived from the inalienable rights of man to life, liberty, and the pursuit of happiness.'"

It has long been his wish to perfect the code system of California—to take in all the laws which have been enacted since the adoption of the Codes, and distribute them where they properly belong and extend their provisions more in detail; to make such a set of Codes that henceforth all legislation upon the subjects treated in them shall be strictly confined to amendments.

As a worker Creed Haymond is absolutely untiring. In the interest of his client he knows not night from day. He knew but little of boyish enjoyment. He never yielded to pleasure in youth, nor has he in manhood. To his client is given all his time, all his energies, and all his ability.

As an advocate Mr. Haymond has but few superiors; he talks with a frank, open sincerity that wins the confidence of his listeners. In the warmth

of argument his voice is clear and pleasant. At times, without effort, apparently by some uncontrollable trick of speech, it changes in an instant to almost a childish treble. Then the transition is startling but delightful.

As a counsel he is safe and conservative. Upon his promotion to the position of General Solicitor of the Central Pacific Railroad, he found more than five hundred cases pending against that company—involving in the aggregate millions of dollars. Much prejudice existed against the corporation among the people of the State. In two years he reduced the number of cases to thirty, and wrought a great change in public sentiment toward the corporation. It is now well known that neither claimant nor attorney, with a just claim against the corporation, will be turned away without recompense being first offered. All claims for damages are thoroughly tried before Mr. Haymond, and impartially judged by him, almost before a claimant is permitted to sue.

He is an officer of the National Bar Association, as well as a member of the local society.

If Colonel Haymond has a hobby it is the advancement of young men. Without children himself he has been for that reason more interested in the sons of other men, and has always been ready with his aid and counsel.

As a man he is thoroughly unselfish, thoughtless of himself almost to improvidence, yet ever considerate to others. He is affable to the humblest, and is loved by all who are brought in contact with him. He never falters in his devotion to his friends. The affection he has inspired among his intimates is almost pathetic in its seeming extravagance. "Colonel Haymond is not to be compared with other men; there is none other like him," said one of his friends. Said another, "My son is to be taught that the truest friend his father ever had was Creed Haymond." And still another wished it recorded that Mr. Haymond had cared for him with more than womanly gentleness during an illness. An employee of his assured the writer that in many years he had never known Mr. Haymond to say an unkind word, though often grievously tried. "And I have had dealings with hundreds of lawyers," he added; "but he was a revelation to me, and is even now a source of ever-increasing wonderment."

His life has been too earnest and too full of work to furnish many of those amusing incidents which in many cases lighten up the biographies of the bench and bar. Though quick at repartee and readily touched by the sense of humor, he is, above all, what the French would term a *l'homme serieux*—a man who is not a trifler in serious matters.

In the midst of all the changes of life, Mr. Haymond looks to Sacramento as his home. There he has recently had erected a handsome burial vault which now holds the remains of his wife. He never neglects an oppor-

tunity to speak kindly of that city. There were spent the happiest days of his life, there his fame grew and spread until it reached its present height, and there in the end he will be laid to rest and sleep the eternal sleep.

He married in 1872 Miss Alice Crawford, an accomplished and beautiful young lady, a native of the town of Auburn, Placer County, Cal., who during her life shared his victories and achievements. He once said to a friend that he could distinctly remember the ringing of bells and the jollification that followed the birth of his destined wife, one of the first children born in Auburn; for the birth of a baby was an important event in those days and in that region. She died at San Francisco in November, 1887, leaving him without issue.

Mr. Haymond said on a recent occasion: "I am an old man, alone in the world; all that is dear to me has been taken away; without hope, without an ambition, except to be right. In any country but ours a professional man would think at his age his life only well begun.

His remaining hope to-day is expressed in the following extract from a letter recently received by a friend:

"I have bought me a ranch. You will be surprised to know that I have got a bargain in a trade and have at last found a place near the University, where I am going, in a year or two, to build a little home for myself. I think that, used as I will use it, if any calamity should overtake me and render me helpless, it would support me nicely.

"You know that I have had in view for the last year a retired life, when I might complete some work long ago commenced, and I now look forward to entering upon this life in a year or two, if I should be spared so long. It will be but a short drive, over a fair road, from the University; in fact, but a good morning's ride, and I will be willing and most desirous to contribute all that I have left in me to its interests and under your direction."

CHAPTER XXVI.

Reminiscences of James A. McDougall, James Churchman, Milton S. Latham, Charles H. S. Williams, William Walker, Henry A. Crabbe, Richard H. Daly, William I. Ferguson, and Isaac E. Holmes—Laughable Excesses of McDougall and Williams—Quaint Sayings of Churchman and Daly—A Circus Introduced into a Senatorial Fight—Further References to E. D. Baker, with McDougall's Fine Tribute—Latham's Extraordinary Fortune in Politics—Walker, the Greatest of Filibusters—Crabbe's Fatal Expedition Into Mexico, 1857—Precocity of Ferguson—His Fall in the Duel with Johnston—The "Bugle Song" in memory of Holmes—Many Incidents of Exciting Times.

James A. McDougall was born in Albany county, New York, in November, 1817. He received a grammar school education. He early evidenced a fondness for mathematics and civil engineering. He aided in the survey of the first railroad built in the State of New York—that between Albany and Schenectady. After the completion of that work, he commenced the study of law. Before completing his studies he removed to Illinois, settling in Pike county in 1837. There he was admitted to the bar, and acquired very soon a good practice. In 1842, at the age of twenty-five, he was elected Attorney General of the Prairie State on the Democratic ticket, and at the end of his term was re-elected, serving four years. Small in stature, he had uncommon strength of physical constitution, as well as of mind. He was a brilliant speaker, skillfully wielding the weapons of repartee, humor and sarcasm, and made himself one of the most noted speakers of the West. In Illinois he met a score of men, who, having become prominent in that State, attained, like himself, a greater celebrity in California—among the number, E. D. Baker, William I. Ferguson, Thompson Campbell, Joseph P. Hoge, Samuel M. Wilson, James H. Hardy, John R. McConnell and O. C. Pratt. McDougall and Baker were especially intimate. Often they traveled the circuit together. Perhaps the two men for whom McDougall cherished the highest admiration were Gen. Baker and Stephen A. Douglas. He himself declared that these two men were the nearest to him by the ties of association and friendship, and among the ablest that ever discoursed counsel in the United States Senate. I will soon give some words of McDougall upon Baker, at once scholarly, tender and pathetic, and which aptly illustrate the former's masterly power of expression.

In 1849 McDougall left Illinois to push further West. He had become one of the most popular men of his State. On the stump, or in the forum, his power was universally recognized; his legal services were in constant demand, but the spirit of adventure took firm hold upon him. He made up an expedition, and led it to the headwaters of the Rio del Norte—the purpose

being to explore the country and establish a settlement. Having arrived at his destination, he heard of the discovery of gold in California. Returning east, he took passage with his family on the California, the pioneer steamship for San Francisco. There he at once entered upon the practice of the law. One year after his arrival he was elected Attorney-General of the State. At the close of his term he was elected a member of the lower house of Congress. In that body he chiefly distinguished himself by his advocacy of a Pacific railroad. On this subject he was peculiarly capable of speaking. He spoke as a lawyer, a statesman and a civil engineer. Declining a re-nomination for Congress, he resumed the practice of law with the late Solomon A. Sharp, in San Francisco. R. H. Lloyd was a clerk and student in the office.

At the outbreak of the war of the Rebellion (1861) General McDougall, by a combination of Republicans and Douglas Democrats was elected a United States Senator. In the senate again he took up his old theme of a Pacific railroad, and, in addition to other arguments, urged the government to build the road as a military necessity. He lived to see the road completed.

When his name was presented as a candidate for the senate his partner, Solomon A. Sharp, was his most enthusiastic friend. On one occasion, during the balloting, the situation was such that McDougall's friends deemed an adjournment for one day absolutely necessary. A motion to adjourn over was voted down. Lee & Marshall's circus was then performing at the capital. Mr. Sharp went out and engaged the entire circus for the special entertainment of the legislators. He had the manager send tickets of invitation to every Solon and kept the performance going all the next day and night. It cost Mr. Sharp \$1,700, but his purpose was accomplished. Neither branch of the legislature had a quorum, and on the following day his friend was elected.

General McDougall was one of the most brilliant debaters who ever sat in the United States senate. He participated freely in discussion; and when it was known that he would speak, the senate chamber was filled by members of the lower house, foreign ministers being among his auditors, and the galleries crowded. Among the subjects upon which he addressed the senate were the expulsion of Senators Bright and Johnson; emancipation; slavery in the District of Columbia; the establishment of a steam line to China and Japan; the Civil Rights bill; the Freedmen's Bureau; the continental telegraph line; the National Academy; the reconstruction measures, and the sale of liquors in the national capitol building. Perhaps the most polished effort of General McDougall's life was his speech in the senate on the death of his friend Baker, December 11, 1861. In this tribute he richly displayed his great learning, his rare powers of speech, and his stores of classic wealth. I offer a couple of extracts:

"He was too full of stirring life to labor among the mouldy records of dead ages; and had he not been, the wilderness of the west furnished no field for the exercise of mere scholarly accomplishments. I say the late senator was learned. He was skilled in metaphysics, logic and law. He might be called a master of history, and of all the literature of our language. He knew much of music—not only music as it gives pleasure to the ear, but music in the sense in which it was understood by the old seekers after wisdom, who held that in harmonious sounds rested some of the great secrets of the infinite. Poetry he inhaled and expressed. The afflatus called divine breathed about him. Many years since, on the wild plains of the west, in the middle of a starlit night, as we journeyed together, I heard first from him the chant of that noble song, 'The Battle of Ivry.'"

"He was an orator—not an orator trained to the model of the Greek or Roman school, but one far better suited to our age and people. He was a master of dialectics, and possessed a skill and power in words which would have confounded the rhetoric of Georgias, and demanded of the great master of dialectics himself the use of all his materials of wordy warfare. He was deeply versed in all that belongs to the relations and conduct of all forms of societies, from families to States, and the laws which govern them. He was not a man of authorities, simply because he used authorities only as the rounds whereby to ascend to principles. Having learned much, he was a remarkable master of all he knew, whether it was to analyze, generalize or combine his vast materials. It was true of him, as it is true of most remarkable minds, that he did not always appear to be all he was. The occasion made the measure of the exhibition of his strength. When the occasion challenged the effort, he could discourse as cunningly as the sage of Ithaca, and as wisely as the King of Pylus. * * *

"It is true cities and kingdoms die, but the eternal thought lives on. Great thought, incorporate with great action, does not die, but lives a universal life, and its power is felt vibrating through all spirit and throughout all ages. I doubt whether or not we should mourn for any of the dead. I am confident that there should be no mourning for those who render themselves up as sacrifices on any great, just and holy cause. It better becomes us to praise and dignify them. It was the faith of an ancient people that the souls of heroes did not rest until their great deeds had been hymned by bards to the sound of martial music. Bards worthy of the ancient time have hymned the praise of the great citizen senator and soldier who has left us."

During his senatorial term General McDougall was a strong advocate of war measures, but never acted with the Republican party. His personal influence with Lincoln was very great. The two statesmen had been warm friends in Illinois, had practiced law together, and while opposed in politics, and dissimilar in some cardinal respects, each recognized and paid deference to the other's greatness. At the close of his service in the senate General McDougall visited his native county of Albany, intending to pass a few months in rest and retirement before returning to California. There he died at Albany, September 30, 1867, a little less than fifty years of age.

Among the prominent causes which engaged General McDougall in San Francisco was the case of Cora, who killed General Richardson, United States Marshal, and the Baker divorce case. In the Cora case he was associated with General Baker. He and Baker frequently tried cases together. It was interesting to see how they would draw toward each other in a great cause.

Each seemed to add to the other's strength and appreciated the other's talents. McDougall would always open and Baker close the argument.

The Baker divorce case, one of the most interesting in all the reports, may be found in the 13th Cal., page 87. The husband was the plaintiff. At the end of four months after the marriage his wife gave birth to a fully developed child. He returned her to her relatives and sued for divorce on the ground of fraud. McDougall was his counsel. He failed in the lower court, but appealed, and the Supreme Court directed the court below to decree a divorce. Judge Field, in an elaborate opinion, Judge Baldwin concurring, declared that the defendant had been guilty of fraud, which went to the substance of the marriage contract, and vitiated it from the beginning.

General McDougall's briefs were models in style and arrangement, and revealed the thoroughly trained and informed lawyer. He was subtle, logical and profound, and looked upon a subject from every stand-point possible. In speaking he challenged attention, not by voice or gesture or by any arts of oratory, but by his thoughtful, vigorous and polished sentences; while "his look drew audience and attention still as night." He was very lucid in expression, of pleasing address, and would sometimes speak for hours to the uninterrupted delight of court or jury. He was pre-eminently a thoughtful, studious man. He was open and frank in manner, full of fun yet very dignified. No man had more pride of character or more pride in his profession.

It must be stated that his death at a comparatively early age was hastened by indulgence in the bowl—a vice which closed the lives of the most brilliant of my subjects. He maintained his dignity of manner even in his revels, and in conversation at all times was one of the most engaging of men. His extensive learning was continually conspicuous, and statesmen and diplomats bowed to his imperial intellect.

The Senator's excesses in Washington furnished some first class sensations. He prided himself on his "westernisms" in dress and manner. He was sometimes seen on the street at night wearing a Scotch cap. Once he rode a mustang at a breakneck speed along a leading thoroughfare of the capital, wearing spurs, a Mexican sombrero, and armed like a vaquero of the plains. He entered the senate, it is said, once with his spurs on. On one occasion, it is also told of him, he rambled off to a little village, and, suddenly concluding to take a certain train at a depot a few miles distant, he endeavored to secure a carriage, but none being available he hired a hearse and lying down inside, had it driven to the depot. Before it was reached, the driver stopped at a wayside place to indulge in the General's favorite beverage. As he was about to mount his seat again, the General, who intuitively took in the whole situation, exclaimed: "The corpse is dry, too." The "corpse" was refreshed.

JAMES CHURCHMAN stood well forward among the strong men of this Bar during our first generation. He was born near Philadelphia, Pa., in the year 1808. Of English Quaker stock, his ancestors came to Pennsylvania with Penn himself. Of his boyhood no facts or incidents are known, except that he studied law in the office of the famous David Paul Brown, and went west long before Horace Greeley began giving his admirable advice to young men on the subject of migration. He "grew up" with the Prairie State, became distinguished at the Bar and as an orator, and won the warm friendship of Lincoln and Baker. During the height of the excitement over the lead mines, he practiced at Galena with marked success. There was much Pennsylvania capital invested in those mines, and large emigration thereto from that State. Joseph P. Hoge and Samuel M. Wilson were then practicing in partnership at Galena. Churchman made himself one of the foremost men of Illinois, and came within a very few votes of an election to the United States Senate. Removing to Iowa he lived some years at Dubuque, where, about 1845, he married. His wife had been married to an army officer named Muree, and was *nee* Lockwood. She had an eventful life and great intellectual gifts. She lived in General Taylor's camp, when Jefferson Davis was a lieutenant. The general's daughter, afterwards the wife of Davis, was her bridesmaid. Her death in Virginia City, Nev., a few years ago, at the age of 71, called forth this notice from the *Territorial Enterprise*:

"While Mr. Churchman lived, the life of the faithful woman was but a series of acts of devotion to him. She traveled with him on the Illinois circuits; followed him to California; went with him to Valparaiso when he was appointed United States Consul at that place; returned with him to Austin, in Nevada, and never left his side for a day until he died. In the early days in California the Churchman home always had its latchstring out, and a custom of the house was to always have it filled with company. The generous and lavish ways of the early Californians received fullest exemplification in that home, and old Nevadans still talk of the genius of James Churchman and the great-heartedness of both himself and his wife."

Mr. Churchman came to California in 1851. Setting out by steamship, his vessel was wrecked off the west coast of Mexico, but his party landing in safety, they pushed on overland. After a short stay in El Dorado county, he settled at Nevada City, where he passed that portion of his life which made his character and qualities known to this section of the country. He met there several citizens, who had either personally known or heard of him in Illinois, and who spread his fame through the settlement. He soon was in active practice, dealing principally with actions affecting mining claims and water rights, which comprised the bulk of litigation. Now and then there was a murder trial. The courts had long dockets, and he was employed in a majority of the cases, although no abler Bar has ever flour-

ished at an interior point on this coast than that at Nevada City from 1849 to 1856. It would be of no utility or interest to state the issues involved in any of his cases, as they possessed only local concern; yet they affected property of great value, enlisted the power of capital, and yielded the Bar a large revenue—the *bars* rather, as there were two kinds, on cordial terms. His only partnership was with H. C. Gardner. The connection ceased when Gardner, in 1856, went to New York City. An incident in Gardner's career may be stated, as showing how easily men took offense in those exciting times:

Gardner ventured at an early day to indulge in the privilege of "scratching" at popular elections. This bold practice had not then become fashionable, and the election clerks counted the votes with a celerity destined, probably, never to be witnessed again. Gardner, in advance of the civilization of the time, scratched from his party ticket the name of one William Mason, candidate for law-maker in the lower house. Hearing of it, Mason went up to Gardner on the street, and horsewhipped him, the while pointing at him a cocked and loaded revolver. Gardner made no resistance but told Mason he would arm himself and meet him on equal terms. The next day, with pistol on, he was passing along the street, when Mason, concealed in a narrow space between two buildings, fired at him. Gardner turned and advanced, firing on Mason. When they had emptied their weapons, each had a bullet in his leg. They were carried off the field, while a fat porkling, which fell before Mason's fire, was removed to a butcher shop.

Mr. Churchman, a few years later, had a narrower escape, if possible, than his partner had had. He had been an old line Democrat in Illinois. He hated his party leader, Douglas, and loved his political foe, Lincoln. In California he sided with the Northern or Broderick wing of the Democracy. He became one of the founders of the Republican party, and took the stump for it. Before the rise of that organization, and during Broderick's protracted struggle to secure a seat in the United States Senate, he made some severe reflections upon the character of Robert Davidge, a young Kentuckian, an opponent of Broderick, who edited a newspaper in Nevada City, called the *Young American* (afterwards the *Democrat*). Davidge had been under President Pierce, postmaster at that place. Churchman, on a political visit to Sacramento, and while standing in the bar-room of the Orleans Hotel, was suddenly approached by Davidge and Wm. Lowery, one of whom fired at him from a pistol, while the other drew a knife. A correct account of the attack could never be given. Mr. E. G. Waite and Senator David Mahoney were near by, but not together. The former, on turning, saw Mr. Churchman on his back, and he grasped Davidge who was rushing upon the fallen man. Persons hastening to the scene put an end to the attack. It was

found that the bullet had grazed Mr. Churchman's face; and then passed through Mahoney's mouth, carrying away several teeth and inflicting a wound which long caused him trouble.

Churchman was very witty, grotesque and quaint in expression. Many good sayings of his are remembered. Once, in the company of Professor Kellogg, and of Senator Burton, he made an elaborate and laughable comparison between the different classes of men and various kinds of animals. One of his observations was that a goose, when invading a barn in pursuit of plunder, would always stoop and bow, even if the doorway was fourteen feet high. Therefore, the men who make politics a trade he likened to geese.

He once built with his own hands two stone walls in front of his yard, terracing the grounds. This was a long and laborious task, and was carried on upon Sundays and moonlight nights. Shortly after its completion, E. G. Waite met him near his residence at a very early morning hour. He asked Mr. Waite if he knew where he could hire twenty-five able bodied, stout-lunged men. Mr. Waite, thinking he desired the men to work on a ditch which he owned, said: "Why don't you put a little notice in the paper, like Jim Whartenby does when he wants men?" (Whartenby was a large ditch owner and miner, and a heavy San Francisco capitalist). "O, I don't want any ditch hands," replied Churchman. "What, then?" he was asked. "I want them to help me *curse*!" answered the angry man, putting fearful emphasis on the final word. Then he proceeded to explain. He had spent a month of Sundays and moonlight nights, he said, and infinite patience, to say nothing about hard work, upon those stone walls, and just as he had come fully to appreciate the beauty and utility of that triumph of his hands, it had been washed away by the first little rain that came along. "I want at least twenty-five lusty laborers to help me *curse*!" he repeated.

Judge A. C. Monson once decided against a point Churchman made. The latter gave back this: "Your honor, it seems to me that this point is so well taken, and so plain and simple to comprehend, that even *you* ought to understand it." Not always would his thrusts excite laughter. Nearly as often he would arouse antagonism by a bitterly savage expression. Few men have been so bold of assertion. His combative, aggressive bent, especially on the stump, militated against his party; he could not woo, invite, conciliate. On one occasion he closed a long attack upon President Buchanan, in which he also disparaged Franklin Pierce, both then living, in these words: "It is lamentable to think that when his [Buchanan's] lamp goes out, there will be only one creature on earth who will have cause to be thankful that he [Buchanan] was ever born. That man is Franklin Pierce, who has been made respectable by comparison." Taking offense in court one day at Hon. A. A. Sargent, since Minister to Germany, he alluded to him as "that thing."

His jury addresses attracted large audiences. He must have filled a magazine of lore in early manhood, for in Nevada he was no student. He kept no library, and cared little for books or office. He seemed to rely upon his genius, his quick mental processes, his memory—which kept him supplied bountifully from the old stores—and on his power as a speaker. In money matters he was improvident, taking no thought of the morrow. His big fees were many, but were expended recklessly in various ways. A large part of his receipts being spent in purchasing and improving his ditch property, an investment which resulted disastrously. He had, however, a comfortable home of his own.

He was a delegate from this State to the National Republican Convention which nominated Abraham Lincoln the first time. He warmly supported his old friend in convention. This recalls again his humorous vein. If he lacked an anecdote for illustration, he would invent one on the spur of the moment, and when, as often occurred in conversation with friends, an original fiction was incubated in his brain, he would give it expression. He was one day, after Mr. Lincoln became President, displaying to some friends in Nevada a handful of seeds of the tree *Sequoia gigantea*. Remarking on the peculiar fact that the smallest seeds produced the greatest trees, he said, with serious countenance, that, some years before, he had sent some of those seeds to Mr. Lincoln, who had planted them in his yard at Springfield, and a tree had sprung from them which had already reached a great height. The contrast between the size of this statement and that of the seed, which he poured the while from one hand to the other, was amusingly striking. "The story," says an astronomer who heard it, "was of the first magnitude, while the seeds seemed smaller than the spot of Venus on the sun a few days ago."

Churchman never sought or held a public office in California. He went to Washington to see his friend's inauguration as President, in March, 1861. There he volunteered as a member of General Cassius M. Clay's guard for the defense of the capital. Shortly afterwards President Lincoln appointed him United States Consul to Valparaiso, Chile. At the end of his four years term he sent his family back to this State and himself went to the mountains of Bolivia in search of gold mines. His explorations led to no valuable discovery, and returning here he went with his family to Austin, Nevada, where he settled, and after following his profession for five years, he died there in 1869, of mountain fever, aged sixty-one years. A son and daughter, both grown, survived him, the former being a mining engineer, and the daughter, Mrs. Nina Larowe, a lady of literary tastes. The latter was one of the "Innocents Abroad," who had the pleasure of Mark Twain's company in the Holy Land.

MILTON S. LATHAM supplied another illustration of how America affords opportunity for advancement to the humblest of her citizens. When only twenty-six years of age he was elected to the House of Representatives. At twenty-eight he was Collector of the Port of San Francisco. At thirty-two he was Governor of California, and before he was thirty-three, or long before a man can be said to have reached the prime of life, he represented this people in the United States Senate.

Latham was born at Columbus, Ohio, May 23, 1827. He graduated from Jefferson College, Pennsylvania, in 1846. Removing to Alabama, he settled in Russell county. There he met Solomon Heydenfeldt, who had gone thither from Charleston, South Carolina, some nine years previous. He studied law, but before commencing practice, was, at the age of twenty-one, in 1848, elected clerk of the Circuit Court of his county. He came to California in April, 1850, opening his law office in Sacramento. Strikingly noticeable he was for the extreme youthfulness of his appearance, and his gentle and winning manners. At the general election after his arrival he was elected on the Democratic ticket District Attorney of the Sacramento judicial district, that district then embracing Sacramento and El Dorado counties.

Latham "stumped" his district. He and the late James H. Hardy were the youngest politicians at the capital. When Latham reached Placerville on his stumping tour, among his auditors was Mrs. Robertson, wife of a prominent politician, whom she survived, a cultured lady, who, after her husband's death, owned and cultivated the finest peach orchard then in the State. Mrs. Robertson was impressed with the speaker's youth, his amiable manner and persuasive speech, and said to a friend, before Latham had nearly concluded: "His youthful face will always carry him through. People will feel like giving him a lift instead of pulling him down."

Not so flattering was the observation of one of Latham's auditors, when, the next night, the rustic wisdom of another camp assembled to hear the young orator. Amid the smooth and steady flow of Latham's periods, a tall Whig giant, in hickory shirt and flop hat, elbowed his way to the front, and, after surveying the speaker a moment, with open mouth and the most comical countenance, suddenly drawled out "Gas!"

"It cut me off below the knees," said Latham, in speaking of the interruption. He was elected District Attorney, and in that office, young as he was, not so much by his ability, as by his amiability—the attraction of his personal qualities—he became the strongest public man in central California. After the lapse of a single year, his party sent him to Congress. His maiden speech was a eulogy upon the life of William R. King, of Alabama, Vice-

President of the United States, who had just died in a foreign land. He had met Mr. King, and had enjoyed his friendship in Alabama, and now alluded to his former association with him in feeling terms. (It may be recalled here that Vice-President King, when elected to his high office, was absent from this country on account of the illness which shortly after ended his life, and acting under advice, he took the oath of office upon foreign soil). Latham declined a renomination to Congress, because his party was split in two, and he was indorsed by only one faction. President Pierce shortly afterward appointed him Collector of the Port of San Francisco. In 1859 he was elected Governor of California, the contest being triangular. The other candidates were Hon. John Currey (Douglas Democrat) and Hon. Leland Stanford (Republican). Later the Republicans succeeded in making Stanford Governor, and they also placed John Currey, who had joined them, on the Supreme bench. Governor Latham had not been in the gubernatorial chair more than a week when he was elected by the legislature (January, 1860,) a United States Senator to fill out Broderick's term. During his phenomenally brief service as Governor he sent to the legislature several elaborate messages on matters of public concern, which he had prepared between the dates of his election and inauguration.

A Governor of California for five days only! It was not death that wrested from him the executive scepter, but auspicious fate wooed it from his hands. With the quickstep of manly ambition he passed from the chair of State to the federal senate—for fame had claimed him as her favorite.

Latham mounted the height, as if aided by unseen wings, and friend and foe alike applauded as, rapidly and without apparent effort, he rose higher and higher.

As an illustration of Latham's magnetic, winning way, James B. Dayton told me, five years after the incident, that while the hot contention for the gubernatorial nomination was going on in the summer of '59, Latham tapped him on the shoulder in Sacramento, and said with bland smile and soft tones, "I want you to help me all you can, Jerry?" Jerry promised, although he had just been the Know Nothing County Clerk and was rapidly drifting to the new Republican haven; Dayton died in Oakland in 1889. Latham never complained of anybody or betrayed any suspicion. The man he defeated for the Democratic nomination was the then Governor of the State, backed by great patronage and powerful prestige—John B. Weller. The convention was a large body, representative, enthusiastic, tumultuous. The Latham candidate for temporary chairman was chosen by a few votes over the Weller exponent. The latter, an eloquent senator, had a ringing partisan speech ready, but fate for that moment sealed his mouth. He delivered it, however, later in the proceedings, after the ticket was complete and the love-feast was spread.

Alluding to Seward, John Brown and the formidable front of the new political foe, he said, "Our enemies are marshaling by black battalions around their Satanic leader, whose brutal theory of an irrepressible conflict has already been consummated in treason and murder." And so he went on in swelling periods. This was Moses Kirkpatrick, of Sierra, afterwards law partner of William M. Stewart at Virginia City, Nevada.

It was an exciting scene when Latham was nominated by the great convention. It looms upon memory's canvas now. The result of the ballot declared by the chairman, a delegate away down on the right near the door, called for three cheers for the nominee. Another on the left and near the platform, in louder tones repeated, "Three cheers for the nominee!" The chairman echoed the electric words and waved command to the standing host—and three cheers were given; no mistake.

At this climax the hero of the hour was seen pressing his way up the left aisle. He was in the city of his home and the house of his friends. The nomination just made was equivalent to an election, and he was to be Governor of California at the age of thirty-two. The handsome person, the gentle eyes, the modest but manly bearing, the neat attire mated to the blond features, the soft felt hat in hand, the flushed countenance bespeaking melting emotion, the extended arms which checked his progress, and the long thunder-roll of acclaim—make up a picture rarely paralleled in political bodies. Involuntarily, I looked around for Ferguson. He was not there. If yet on earth he had been (like Baker, not yet fallen) a leader in another camp. But how generously would he have given his personal plaudits to the foeman! How high he had aimed magnetic arrows! Spirit aflame, quenched all too soon! Burning for human glory, electric in speech and action, great captain in the battle of party, all conquering in debate! You were not seen, but were you looking on? Or were you with celestial "Ruperts of debate," at intellectual war?

Upon the close of his senatorial term in March, 1863, Mr. Latham determined to have done with public life forever. Having attained to dizzy heights, he was then only thirty-six years of age. He repaired to London and opened negotiations with English capitalists, which resulted in the establishment in San Francisco of the London and San Francisco Bank, with Latham as manager. He gave up this trust some years later, becoming the leading spirit of the North Pacific Coast Railroad Company (narrow gauge). This enterprise proved disastrous, and he was compelled to surrender the road to the English bond-holders. He enjoyed life quietly, yet abundantly, until the year 1872, when he began to suffer from stone in the bladder. It was widely supposed, when Mr. Latham left the North Pacific Coast road, that he was ruined in fortune, but it was not so. He still retained a hand-

some competency. He always knew how to acquire and how to husband his resources. One of the finest buildings in Sacramento was built by him. In 1880, he sold at public auction in New York City his library and paintings, which realized him \$100,000. As a cautious business man he had few superiors, the railroad enterprise just mentioned being his only unfortunate investment. About 1853, in Sacramento, he made his first will. John B. Harmon, now of San Francisco, and A. C. Monson, then District Judge at Sacramento, now of New York City, were appointed executors. All of his affairs were summed up on two pages of legal cap. His accounts were straightened daily and his books were balanced daily. His executors could tell in ten minutes just how his matters stood.

Latham married in 1853, at San Francisco, Sophie, daughter of Dr. Birdsall, Superintendent of the United States Branch Mint. This lady was an invalid all her life. Latham was devoted in his long and wearisome attention to her, and after her death he erected to her memory a mausoleum, which, in grandeur and costliness, was unsurpassed by any west of St. Louis. The matchless, womanly figure of chastest marble, looking with solemn inquiry upon the restless ocean—at her feet the words "ETERNAL REST"—will challenge the melancholy admiration of the beholder many, many years before time shall hurl it to the dust.

Mr. Latham's second wife, who survives him, was the sister of Thurlow McMullen, and step-daughter of George O. McMullen, of San Francisco. Her mother and her two infant half sisters were drowned at the burning of the steamship Golden Gate, on the Mexican coast, about 1862. There are several children of this second marriage.

GENERAL CHAS. H. S. WILLIAMS, a native of New Hampshire, came to California in 1852 from Buffalo, New York, in which State he had had twenty years experience at the bar. For fifteen years he was prominent on this coast in law and politics. The unanimous verdict of the old bar is that he was a great lawyer. He was in partnership at different times with Park, the Shafers, Lorenzo Sawyer—afterwards District Judge, now on the bench of the United States Circuit Court—and Clark Churchill, since Attorney General of Arizona. His life was a thrilling drama. A heavy drinker, frequently when in his cups, he went on extensive excursions, escaping many "moving accidents by flood and field." In Alameda county once, while a passenger on a stagecoach, when the stage stopped at a dining station and the passengers were at the table, the General mounted the driver's box and drove off with his four-in-hand as proudly as Hank Monk ever did. He

stopped at the next station, not before. Plenty of trouble followed this freak, but the General had princely revenue from his practice, and he made it all right. Like a California farmer, he never thought of working more than a third of the year. He once chartered a schooner, and, taking no friends with him, sailed out to sea, returning after many days. He was intensely fond of horses and of holding the lines. Many times did he make the circuit of San Francisco and drive through its principal streets, seated on the hackman's seat with the Jehu by his side. At these times, when he was not himself, he was usually uncompanionable and wanted to be let alone. But latterly he insisted upon having the company of his office clerk, who was Churchill, then, but who was afterwards his law partner. He jumped into a hack with Churchill one day and among other places sojourned at the "Willows," now no more. A waiter was promptly at hand. After discovering what the General wanted, the waiter turned to Churchill with the usual interrogatory. Churchill said: "Nothing for me." "Don't you know he don't drink?" thundered the General, and, as if outraged by the waiter's ignorance on this subject, he got up and struck at the man, whose face had become as white as his apron, but Churchill—sober Churchill—interfered.

On the 4th of January, 1867, General Williams was conversing with some gentlemen on business, in his office on the southwest corner of Kearny and Sacramento streets. He stepped into an adjoining room, which was his bed chamber—his family being in New York—to get a paper from his bureau drawer. A minute afterward a pistol shot was heard in his bedroom, and, rushing in, the gentlemen who had been conversing with him found the General lying on the floor. A pistol was at his side, a bullet in his brain, and in three hours he was dead. Consciousness returned to him before death, and he stated that the shooting was accidental. He was unable to state the circumstances. The Coroner's jury also said it was an accident. It was supposed that on opening the drawer he took hold of his pistol, which exploded while being handled.

General Williams was a poor business man. His estate was worth only a few thousand dollars above his debts. Samuel F. Butterworth held his note for \$25,000, which had been raised by interest unpaid to \$33,100. The widow realized but a trifle, a few thousand dollars. The General's son, Charles H. S. Williams, Jr., practiced law for a short time in San Francisco. He went to Boston and acquired a fine practice. In 1880 he was drowned in a small lake near Concord, New Hampshire, on which it was his recreation to skate. He left a family. His life was insured for \$50,000. General Williams once represented San Francisco in the State senate. During his term the famous bulkhead scheme passed the legislature and was vetoed. He opposed that measure. He was the Attorney General of New York about 1845—hence his title of General.

GENERAL WILLIAM WALKER, "The Gray-Eyed Man of Destiny,"—the greatest filibuster of modern times—was a lawyer, and followed the profession in several States. He also studied two other professions—medicine and divinity. He was a Virginian, small in stature, quiet in manner, always self possessed, and attracted the eye chiefly by his own enormous gray orbs, which gave him the title above. Walker was a born adventurer. Yet was he gentle in speech and subdued in demeanor. His information was wide. He frequently had personal altercations, and fought several duels, but went into conflicts of every kind with phenomenal composure. His habits were good, and he was generally well liked. A mighty visionary was he. His ambition was to effect a conquest on the isthmus as a nucleus for a broad dominion, to be extended into Mexico and South America. In both Honduras and Nicaragua he was a conqueror. The land was his, and the people at his feet, but Anglo-Saxon power overthrew him. After being driven out of Nicaragua, he repaired to New York to devise other plans of conquest. Colonel E. C. Marshall there met him, by chance, under the gaslight. He was enthusiastic over his Honduras scheme—said that dwarfed all his former plans. He was going to establish a great republic between the continents. It is believed by those who knew him, that had he succeeded in establishing his power, he would have been a wise and beneficent ruler. His political knowledge was great.

General Walker had all Europe and half of America against him. He had not been long in Honduras when the forces from a British fleet, well knowing that Uncle Sam would not interfere, captured him and turned him over to the native Honduras authorities. He was promptly shot.

For further allusion to Walker and his Nicaragua scheme see the chapter on Edmund Randolph.

CRABBE AND M'COUN. The fate of Walker was that of Henry A. Crabbe and State senator McCoun, two lawyers who led an expedition into Sonora, Mexico, in 1857. Crabbe was from Tennessee, and practiced law in Stockton. He was for one term senator from San Joaquin. His name, which, in full, was that of his father, once prominent at the Tennessee bar, was before the Knownothing caucus, with those of Foote and Ferguson for United States Senator. McCoun was in the senate from Contra Costa county. He was a Kentuckian. Crabbe and McCoun entered Sonora with a few hundred men, relying upon an uprising of the people against the government. They were attacked by a force largely superior in numbers and retreated into a church, which was set on fire by a burning fagot attached to an arrow shot into the roof. Compelled to march out, they were captured in a body,

and summarily and ignominiously put to death. They were stationed in rows in front of their open graves, hands tied behind them and were then shot in the back. McCoun, on hearing the command to fire, quickly faced about, and received a bullet in his breast. He was a man of commanding form and noble spirit. Crabbe, who had a wife, a Mexican lady, in California, was given time to write a letter and he was then beheaded.

RICHARD H. DALY was born in Mecklenburg county, Virginia, January 12, 1816. He was a graduate of the Virginia Law College. It is said, but not authentically, that he removed, in early manhood, to Louisiana, and represented that State in the lower house of Congress. He came to California around Cape Horn, arriving in May, 1849. He went at once to Calaveras county, and commenced law practice, his office being at Robinson's Ferry. At the first election under the State government, in 1850, he was the Whig candidate for County Judge of Calaveras county. His Democratic opponent was W. Fowler Smith, who afterwards killed the County Clerk, Collier. During the campaign a flaming notice was posted on a tree at the populous mining settlement of Murphy's Camp, announcing, in unique and elaborate phrase, Mr. Daly's candidacy for County Judge. It purported to be made and signed by him. About every other word was misspelt, thus: "Notis—I announce I am a candidit for Kounty Jug," etc.

Smith defeated Daly by some twenty majority. The latter always maintained that it was the "notis" that "settled his hash." There were two theories as to how the paper came to be posted. One was that some illiterate but well meaning friend of Daly's had placed it there. The other was that Fowler Smith put it there, in pursuance of a "way that was dark," and Daly always insisted that this theory was correct.

Daly was, perhaps, from the circumstance just narrated, during the whole of his somewhat lengthy career in California, known as and styled "Judge" Daly. But the only position which he ever occupied wherein he exercised judicial powers was, so far as my inquiries have extended, that of Alcade, a sort of Justice of the Peace, at Robinson's Ferry. In the fall of 1850, Judge Daly removed to Agua Fria, then the county seat of Mariposa county. He soon acquired a fine practice in that and adjoining counties, and held it for many years, in spite of his proneness to conviviality. In 1855 he was elected District Attorney, and was re-elected in 1857, conducting the office with ability and credit. In 1860, he was a candidate for Presidential Elector on the Bell and Everett ticket. In 1862, he was the regular Democratic candidate for District Judge of the district composed of Mariposa, Tulare, Merced, Stanislaus and Fresno counties, and was defeated by

Ethelbert Burke, who received the Republican and Douglas-Democratic vote. Judge Daly was one of the lawyers of and concerning whom numberless "good things" are told. He was an effective stump speaker. On one occasion, at Visalia, he was introduced to the crowd in one of his super-happy moods. The platform had no railing. With head erect, and arms extended, he accompanied his first word "Fellow" with a sudden forward movement, which would inevitably have precipitated him into the sea (of heads) below had not two sympathizers grabbed him by the coat and pulled him back. Realizing his condition and surroundings, he braced up with a remarkable effort of will, and, after raising a laugh by declaring that some political enemy had put whisky in his water, he went on and delivered an offhand speech which elicited great merriment and applause.

At another time he told a party of friends about his once getting lost on the hills of Mariposa county. He was on a professional journey, on horseback, alone, and lost the road. After many hours were spent in trying to get on the right track again, he espied a dog moving at a comfortable gait across the hills. Happy thought! "I will follow him," he said; "he is going to some human habitation." So he followed the dog, but the dog followed no road! After an hour's pursuit, and as darkness approached, the Judge muttered, "He don't seem to be going *anywhere*; I'm afraid he's lost, too." A little hillock put its crest between the "solitary horseman" and the slowly moving dog. The Judge, taking advantage of the moment, spurred his steed to the top of the hill, and got within fifty yards of the object of his pursuit. Alas! his *ignis fatuus* was a coyote! Wheeling around he galloped off, letting his horse go without check or guide. Soon he heard the roll of wheels ahead; and pushing onward, found the road. An hour later he was seated at a farmer's table. The Judge told this to his party of friends, "just to show how anybody is liable to make a mistake." He made large sums of money at his profession, but left his family entirely without means. This was the result of his improvidence, his bent for the bowl and the table of chance. At an early day, for some legal service done his county, he was paid a fee of twelve hundred dollars in gold dust. He played it all off one night at Hornitos. Rising from the table, he said gravely, "I'm ahead; I took the gold dust at \$12 an ounce, and bucked it off at \$16."

He was correct in his writing, but defective and quaint in speech. He had the cornfield dialect—"Shut the *do*;" "Don't do that any *mo*;" etc. With good reasoning powers, he gave little thought to the art of expression. He occasionally committed grievous offenses against grammar, and would now and then coin a word, with the boldest independence of the "best writers and speakers." When litigation was brisk in Mariposa, it not infrequently happened that counsel would be summoned there from San Francisco.

About half way back to '49 an important cause was pending at the former place before the District Court, it being an action to enforce the specific performance of a contract for the sale of valuable lands. Lewis Shearer, of San Francisco, was employed for the defense; and Judge Daly was counsel for plaintiff. Shearer demurred to the complaint on the time honored ground that "it did not state facts sufficient to constitute a cause of action" in this:—That the contract did not contain the element of mutuality—the sauce was all for the goose, none for the gander; it was a case of "I'll take the turkey, and you may take the goose, or *you* may take the goose and *I'll* take the turkey." Shearer having argued in support of his demurrer, Daly replied: "Your honor," said he, "my young friend from San Francisco relies upon the sole point that this contract contains no mutuality. He leans on a broken reed. This contract, your honor, was drawn by General McCullough, sir! General McCullough has been Attorney General of this State, and distinguished himself in that high office! Your honor will not be persuaded that a gentleman of his legal ability would draw a contract that was not mutualitous!"

The judge was greatly addicted to getting names and nicknames wrong. He once, in argument, referred to "Buckland Jack" as "Buckhorn Jack." In reviewing a mass of evidence he came to the statements of a witness named Odom. "Now, gentlemen," said he, "we come to the testimony of Mr. Odium."

Judge Daly was a man of strong physical frame, over six feet high and broad shouldered. He had thick lips, a sensual mouth, but a pleasant eye and went close shaved. He married, in the town of Mariposa, June 8, 1858, Miss Susan E. Bedford, a native of Augusta, Georgia. He had by this estimable woman eight children. He died at Fresno, February 2, 1887, aged sixty-one years.

Another amusing anecdote of Daly is to be found on page 303.

"FELLOW CITIZENS, one year ago to-day I performed a duty such as I perform to-day, over the remains of Senator Ferguson, who died as Broderick died, tangled in the meshes of the code of honor." These words spoke Baker at Broderick's burial. Ferguson, just before dying, said, "My friend Baker has known me best in life; ask him, if he will, to speak of me when I am dead." Baker's oration over Ferguson delivered in the Assembly Chamber at Sacramento, September 16, 1858, was fully reported and has been preserved. It is but little inferior to the Broderick masterpiece.

WILLIAM I. FERGUSON was born May 9, 1825, in Pennsylvania. At the age of ten his father, a carpenter, took him to Illinois. He received a common school education and studied law at Springfield, in General Baker's office. When twenty-one he was admitted to the bar; at twenty-three, in the presidential election of 1848, his name was on the Democratic electoral ticket; at twenty-five he ran for the legislature but was defeated by the Whig candidate. He speedily acquired a fine law practice, but was an enthusiastic politician, of boundless ambition, and was on the stump in every party campaign. His wit was rich and unfailing, his invective terrible. The most signal manifestations of his power in this line were his noted philippic on the stump in 1857 against the two then most influential newspapers of the State, and his eloquent wrath poured on the head of Senator Wilson Flint for refusing to vote for the Knownothing caucus nominee for United States Senator. These are preserved in the old *Union* files. As a stump speaker, no man except Baker surpassed him in Illinois, and none except Baker and Tom Fitch in California. He was chosen in Springfield, in 1840, to deliver the Fourth of July oration, when such men as Lincoln and Logan desired the honor. It was a luxury to hear him speak. In a letter which I received from Mr. Herndon, once President Lincoln's law partner, Ferguson's Fourth of July oration in 1840 is described as "truly eloquent; finely, grandly eloquent." If Mr. Herndon is not mistaken in the year, Ferguson was then a boy of fifteen. His precocity was marvelous. He was a great reader, a deep thinker. He loved to read aloud Greek, Roman, English and American orations, pacing his room at the same time. He would go into the woods, address the trees and apostrophize nature. In disposition he was most lovable and winsome; in personal appearance, striking. His complexion was most fair; his forehead "the dome of thought"—

"A combination and a form, indeed,
Where every god did seem to set his seal,
To give the world assurance of a man."

Like McDougall, he loved the four W's—"Woman, Wine, Whisky and War," and he was, like most brilliant lawyers, full of fun. On one occasion, he and Mr. Herndon were on the road going to court in Christian county, Illinois, when they heard that the judge, David Davis, since President of the United States Senate, was sick and would not attend. They were requested by their informant, who was a messenger from the judge, to

"carry the news." "We'll have some fun," said Ferguson. Arrived at the courthouse, he told the sheriff and clerk that he came to hold court for Judge Davis, and they, believing him to be a judge duly authorized, court was formally opened—Ferguson on the bench. A lawyer made a motion and an argument, to which Ferguson gravely listened. He fined one old farmer one dollar for keeping his hat on, and imposed four or five other one dollar fines for little offenses, such as talking aloud, putting feet on benches, etc. When the lawyer finished speaking, Ferguson granted his motion without letting the other side be heard. When the other lawyer insisted on speaking, Ferguson made him pay a dollar for contempt of court. Then he adjourned. Leaving the bench he said in loud and merry tones, "Let's all go and have a general frolic with this fine-money—a fine time." Not till then did the villagers know that they were in a sham tribunal. Mr. Herndon said that those who had paid the fines enjoyed the joke more than those who escaped.

Ferguson went to Texas in 1852, and came to California in the summer of 1853, settling at Sacramento, where he had a good practice, chiefly criminal. He sought to make his profession a stepping stone to political fame. His heart was set upon a seat in Congress. In 1855 he was elected a State Senator on the Know-nothing ticket, and was made Chairman of the Judiciary Committee. He was a prominent candidate for United States senator, but was defeated for the caucus nomination by Henry S. Foote, who failed of an election by the legislature, owing to the defection of a single man. In 1857, having gone back to his first love the year before, the Democracy returned him to the State senate, his opponent being John A. Brewster. It was a beautiful but exciting and memorable night which closed the campaign of 1856. The Knownothing clans, embracing a large majority of the merchants of the city, were massing in large numbers in front of the Orleans and Union Hotels, the balconies of which were filled with ladies. Grove Deal, father of W. E. F. Deal, was to entertain the multitude. He knew how to do it. The Fillmore Glee Club was on hand with happy songs. Just around the corner, in front of the Western Hotel, a second class house, the "unterrified" were gathering to hear Ferguson. The crowd was small compared with the other, and not a lady's eye looked encouragingly upon it, but when Ferguson appeared it burst into extravagant demonstrations of joy. He commenced to speak. He had only said, "My fellow Democrats, I salute you!" in a tone which thrilled the crowd, when the sound of sweet voices, charmingly blended, rang out upon the air. It was the Fillmore Glee Club singing at the monster meeting around the corner. Hesitating only a moment, Ferguson resumed: "Could they find salvation in song, they were safe. Poor fools and blind, they are singing on the edge of the grave!"

Then he repeated the lines:

Have you heard the tale they tell of the swan,
 The snow-white bird of the lake?
 It noiselessly floats on the silvery wave,
 It silently sits in the brake.
 It saves its song to the end of life,
 And then, in the soft still even,
 'Mid the golden light of the setting sun
 It sings as it soars into heaven!
 And the blessed notes fall back from the skies—
 'Tis its only song, and in singing, it dies!

True it was, the Know-nothings were dying in song.

When the Democratic party split in two, Ferguson sided with Douglas. He made a powerful speech in vindication of the latter in the State senate. This was the great speech of his life, and was reported fully for the old *Union* newspaper. It is very severe upon what he called "the Lecompton iniquity."

In September, 1858, Ferguson, while on a visit to San Francisco, became involved in a personal dispute with Hon. George Pen Johnson, who challenged him to mortal combat. They fought on Angel Island, and at the third fire Ferguson was hit in the hip and fell. Dr. A. F. Sawyer and other able physicians and surgeons attended him. He was advised that his leg must be amputated. His answer was that he would not lose his leg for the State of California. When the doctors saw the crisis was at hand, they put him under the influence of chloroform and removed the leg. He never rallied, dying at the Union Hotel, now the south part of the old City Hall, about two weeks after receiving his wound. His sportive spirit had displayed itself even on the field of encounter. He was not accustomed to arms. At the third exchange of shots he fired before his adversary. Seeing that he had miscarried, he braced himself up. "I'm a gone community," he said; and a second later the shot struck him.

It was my good fortune after patient search many years ago, to find and rescue from limbo, in an artist's closet, the only portrait of Ferguson in this State.

I have written more of this lovable but wandering spirit in the *REPRESENTATIVE MEN*, (1870). There may be found in full Baker's moving words over the fallen and reckless brave, who loved fame as ardently as Baker himself. There, too, is Rev. Dr. Benton's discourse delivered at Ferguson's burial, a production scholarly, thoughtful and very affecting.

ISAAC E. HOLMES was one of the most interesting characters that ever adorned the legal profession in any country. He brought to California a national fame. A native of South Carolina, he graduated from Yale College,

and studied law with Daniel Lord. Having thoroughly equipped himself for the bar, he commenced the practice in Charleston, South Carolina. A most forcible and eloquent speaker, his splendid gifts of oratory, added to his great learning, made him prominent in politics at an early age. He represented his native State in the lower house of Congress for six consecutive terms. The old *Congressional Record* reveals his power of expression and his brilliancy in debate. He was exceedingly popular with his fellow members; and in political and social circles in Washington. Some specimens of his eloquence are to be found in Williston's "Eloquence of the United States."

Holmes came to California in 1851, leaving his family in South Carolina. He quickly attained a leading position at the bar, the famous Argenti case being the most noteworthy of the many with which he was connected. For some years he boarded with Thos. W. Freelon, John B. Felton and other genial legal spirits at Madam Parrain's celebrated private boarding house on Clay street, near Powell, where the table was constantly kept "on a roar" by his animated and sparkling talk. His literary taste was superb—absolutely exquisite. He was impulsive, excitable, yet peculiarly gentle, and companionable. Of course, the circle of his friends was very large. He was especially accomplished in English and Latin literature. His conduct of causes showed very keen powers of observation, and occasionally he would turn aside from stern argument and indulge in the most melting pathos. An eloquent speech or a tender poem would powerfully move him. When Freelon read to him Webster's oration on Greek Independence, he betrayed violent emotion. When the Judge, at another time, in one of their delightful chats, recited Tennyson's "Bugle Song," he shed tears.

He was a money-making man, but an improvident one. He was constantly speculating. He had little business sagacity, yet made and lost several fortunes. When his family rejoined him, consisting of his wife and an adopted daughter, he bought a place in Alameda county, and lived there some years. At one time he bought an interest in a flour mill, which he exchanged for the since well known Piedmont Springs property. At the outbreak of the war of the Rebellion, he returned with his family to the East, with the firm conviction that his great influence in his native State, as well as in Washington circles, could be effectively exerted in the interest of peace. He labored faithfully to this end, but, of course, to no purpose. He died in Charleston, South Carolina, in 1864. He had left his power of attorney with William Blanding. After his death, Captain Blanding sold the Piedmont property for \$30,000, which sum, in addition to other real estate which he had left in California, placed his family above the reach of want. His memory is delightful as song; let it blend with the melody that so masterfully moved his soul:

"THE BUGLE SONG."

The splendor falls on castle walls
And snowy summits old in story;
The long light shakes across the lakes
And the wild cataract leaps in glory.
Blow, bugle, blow, set the wild echoes flying:
Blow, bugle; answer, echoes, dying, dying, dying.

O hark, O hear! how thin and clear,
And thinner, clearer, farther going!
O, sweet and far, from cliff and scar,
The horns of Elfland faintly blowing!
Blow, let us hear the purple glens replying:
Blow, bugle; answer, echoes, dying, dying, dying.

O, love, they die in yon rich sky,
They faint on hill or field or river,
Our echoes roll from soul to soul,
And grow forever and forever.
Blow, bugle, blow, set the wild echoes flying,
And answer, echoes; answer, dying, dying, dying.

CHAPTER XXVII.

William H. L. Barnes—The Most Versatile of our Lawyers—A Picturesque Career—Parentage and Education—Relations With Charles O'Connor and Joseph H. Choate of New York—Association With Eugene Casserly in San Francisco—Selling The Mercantile Library—Before The Footlights—Writes A Play—Some of His Great Cases At the Bar—Knighted By the King of Sweden—Nautical Knowledge—"A Trip in a Government Ship" With Queen Emma—At the Head of our Military—A Condensed But Very Entertaining Chapter.

"Fellow Citizens: I have the pleasure of presenting to you a gentleman who needs no introduction to a San Francisco audience."

This stereotyped formula, adopted by the average chairman of San Francisco mass meetings, comes strongly to mind as Gen. William H. L. Barnes appears for notice. He has been very long not only a shining light at this bar, but, outside of his professional duties, he has shaken hands with the public and addressed them familiarly, on numberless occasions and in manifold capacities.

General Barnes was born at West Point, New York, February 11, 1836, his father, James Barnes, an officer in the regular army, being at that time stationed at that place. In 1840, James Barnes resigned from the army and entered upon an active business of railroad construction—as engineer of some of the longest routes of travel in the United States. For several years he was employed in Russia as consulting engineer of railroads between St. Petersburg and Moscow. At the outbreak of the American rebellion, he returned to volunteer service, was commissioned Major General of volunteers and served throughout the war in the army of the Potomac. In 1868 he died, of wounds received at Fredericksburg and Gettysburg.

William H. L. Barnes was educated at Yale College, in the class of 1855. He studied law in Springfield, Massachusetts, with Hon. Reuben A. Chapman, one of the most distinguished lawyers of that State, who afterward became Chief Justice of the Massachusetts Supreme Court. Before completing his legal studies he removed to New York City, where he entered the office of Charles O'Connor as managing clerk, remaining in that position and continuing his studies for four years. At that time there was in the corresponding place in the office of William M. Evarts, a young man who has since become a bar leader in the great metropolis; one who has proved himself well grounded in the science; a most happy, fluent and witty speaker, and who has long been the brightest light of the "New England Society in the City of New York." He has been President of that association for several terms and at the annual dinners, which are grand affairs, his manner is the most inviting, his presence the most welcome, his soul the most genial, his tongue the most

eloquent of all around the festive board. Judging from what I have heard of him, and from his forensic and social speeches, many of which I have gathered and preserved, he must be one of the most talented as well as one of the most charming of men. I refer to Joseph H. Choate. William H. L. Barnes and Joseph H. Choate made up their minds at the same time to commence practice for themselves. They formed a partnership, which had continued only a short time when the war broke out, and Mr. Barnes went into the army. He was on General Fitz-John Porter's staff. Contracting sickness in the field, he left the service and came to California. This was in April, 1863. He had no idea of remaining here, his object being to regain his health; but, bringing a letter from Charles O'Connor to the Hon. Eugene Casserly, he was invited by the latter to a business connection, which, being pleased with the city and country, he concluded to accept. In August, 1863, commenced his partnership with Mr. Casserly, which, although the two gentlemen were radically dissimilar in almost every respect, lasted until Mr. Casserly's election to the United States Senate in 1869.

Mr. Barnes was strongly opposed to Mr. Casserly in politics, but under the impulse of friendship he gave his partner a warm personal support. It was a hard fight between Mr. Casserly and Colonel Hoge, the latter being a recognized leader of the Democracy, and enjoying the unqualified respect and admiration of his whole party. But there was more personal effort executed on the side of Mr. Casserly, and Mr. Barnes made his influence felt in behalf of the victor. He visited Sacramento and remained until the struggle was over; and at the jollification meeting which followed, he appeared and made a speech. It was not long, however, before his Republican friends forgave him, recognizing that he was actuated solely by motives of personal regard. His party never fails to call for his services in every campaign, and he promptly responds.

Since Mr. Casserly's election to the Senate, General Barnes has had no partner, if we except a few months' nominal partnership with Mr. H. P. Bowie.

To return to the time of his entry upon the practice at this bar, it may be said that General Barnes quickly obtained recognition from the profession and the public as an accomplished advocate. His manly presence, polished address, quickness of perception, diligence in business and excellent knowledge of the law, won him speedily many valuable friends and clients, and placed him abreast of his ablest brothers. He is gifted with rare powers of conversation. Being a willing talker, his wealth of speech and his stores of information are constantly exhibited, his talk being sprightly and engaging, always sensible, and usually flavored with the genuine extract of mirth. He is the most versatile man I know—he is scholar, linguist, actor, author, artist,

lecturer, lawyer. A light in his own particular sphere, he is at the same time luminous in the social world. This mind has very many sides.

The General's connection with the Mercantile library of San Francisco, and his valuable services rendered to that noble institution are gratefully remembered by our people. When Murphy, Grant & Co., were pressing a large claim against the association, and the books in the library seemed to tremble on their shelves, General Barnes and the late R. B. Swain met in an unfinished room in the new building, and deliberated upon the crisis, over an old flour barrel filled with lime. It was settled upon as a happy suggestion, that the General should appear before the footlights: "I'll play," said he; "I think I can do the business." He went to Lawrence Barrett, lessee of the California Theater, and revealed the result of the conference. Barrett "stood in." He suggested Hamlet, and Elliott Gray in "Rosedale." The General said: "I'd rather tackle 'Rosedale,'" and that play was adopted. The seats of the theater for the night of the General's appearance were sold at public auction, no seat bringing less than five dollars, except those of the gallery. When the night arrived the theater overflowed with the mind and fashion of the city. The performance was a success, and won plaudits from the critics. The General's voice was good, his conception correct, his playing spirited and his large and faultless figure showed to fine advantage. The net receipts were \$5,240, which paid off all the indebtedness of the library.

The play of "Solid Silver" was written by General Barnes during a period of four days, when he was detained at home by sickness. Receiving a visit at that time from the late W. C. Ralston and the tragedian McCullough, he showed them the production, and they expressed their gratification. McCullough placed it on the stage here, and it was received with favor. It was afterwards produced in many of our Eastern cities and in Australia. From the sale of rights to perform it the General received about \$3,500. He has a brotherly feeling for great actors, and cultivates their society. He was a stockholder of the old California Theater Association, of which enterprise he was a zealous projector. He was President of the Mercantile Library Association in 1865. He was the most active worker in the enterprise of erecting a structure worthy of that institution and creditable to the city. There was no money on hand. "We put it up on gall, on nothing else," said he one day, in alluding to it. Then came the great lottery, which saved it.

In the line of his profession, General Barnes has maintained for many years a very large business. In January, 1877, in the Fourth District Court, was commenced the trial of the case of O. P. Fitzgerald vs. C. August Klose. The plaintiff claimed damages for libel. He charged the defendant with having published in the *Alla* of October 20, 1875, a false and scandalous

card, setting forth that plaintiff, while State Superintendent of Public Schools, received a bribe of \$3,000 from the publishing firm of Wilson, Hinkle & Co., of Cincinnati, for his influence in securing a change of text books in the common schools of the State. The defendant admitted the publication, and alleged it was true. The parties had formerly belonged to the same church, the plaintiff being pastor. The trial of the case lasted six days. General Barnes and Jarboe & Harrison appeared for the plaintiff, and Alexander Campbell and Sawyer & Ball for defendant. The plaintiff had been recently defeated for re-election to the office of State School Superintendent, and while a most excellent man, with a host of personal friends, was under a political cloud. General Barnes was his political foe, but, forgetting partisanship, he made the chief speech in the case. He told the jury that he was instructed by his client to say that he only asked nominal damages. He wanted a verdict, but was not seeking to make money out of the matter. The jury gave a verdict in favor of the plaintiff for \$1,000. A little blunder made by the General in his speech in this case is recorded here for the enjoyment of the many who have felt his thrusts. Having occasion to refer to the frequency of crime, he said: "All crimes have been common since Cain killed Abel in the Garden of Eden."

The Sunrise cases will long be remembered, for they were exceptional in revelations of human depravity, and attracted the attention of remote cities. A newspaper correspondent in certain criticisms upon these trials, observed, in regard to ship captains and mates, that "brutality is interwoven with their nature, and is positively regarded by them as a refinement." Of course he admitted there were many exceptions to the rule, but the Sunrise officers were certainly not among these exceptions.

The ship Sunrise left the port of New York in May, 1873, and arrived at San Francisco September 27, 1873, after a voyage of one hundred and eighty-three days. Immediately the captain reported the loss of three of the crew, on the voyage. The second mate at once went into the country, whence he was a few weeks later brought back. On the next day after the ship's arrival here, Lejude, a Frenchman, complained to a city editor of cruel treatment received by him and the rest of the crew. A few days afterward the captain of the Sunrise, Robt. K. Clarke, paid through his friend, Captain Scott, \$50 to each of the crew, except to one, who received \$300, in settlement of all demands of every nature they had against him.

But this passage of money did not compromise the rights of the people. The United States grand jury investigated the matter and indicted Captain Clarke, and his two mates, Frank Harris and Dennis Malloney, for cruel and inhuman treatment of the Sunrise sailors—the captain being indicted on thirteen counts; his first mate, Harris, on one hundred and six counts; and

the second mate, Malloney, on a few counts. Before the trial came off, the nature and aggravated degree of the cruelty practiced by the officers of the vessel became pretty well known to the press, and, through that medium, to the public, whose indignation was thoroughly aroused. The San Francisco *Post*, edited by Henry George, the since famous economic writer, sought to engage General Barnes, at its own expense, to assist the prosecution. He consented to prosecute, but declined a fee. Having read of the charges preferred, and believing that something should be done to check the practice of cruelty at sea, he determined to avail himself of this opportunity to bring a trio of tyrants to justice. Neither Clarke, Harris, nor Malloney was a bad looking man, especially Clarke, but there is no doubt that all three were guilty, and that each of them carried a hell in his bosom. They were tried separately. The three trials consumed a month before Judges Sawyer and Hoffman. Mr. Latimer, the accomplished United States District Attorney, left the prosecution to his talented associate, Mr. W. W. Morrow, and by the side of Mr. Morrow sat General Barnes. It transpired that public justice and public decency demanded the conviction of the accused, and right ably did the prosecuting attorneys conduct their side of the case. So did the defense. Messrs. Milton Andros and Alexander Campbell delivered powerful appeals in behalf of their clients, who were yet iniquitous men. They did their full duty. The defendants were entitled to justice, and they got it. On the trial of Captain Clarke it was arranged between General Barnes and Mr. Morrow that the latter should open and the former close the argument. The prosecution, learning of this, invoked the aid of a California statute which required the District Attorney to close. The court granted the demand of the prosecution and required Mr. Morrow to close. Accordingly General Barnes had either to open, or hold his peace. He preferred the latter alternative. When the court said, "Proceed, Mr. Barnes," he replied, "My duties in this case are performed, your honor." Then he added, *sotto voce*, "If I can't have my cake as I want it, I won't take it at all." This threw upon Mr. Morrow the whole burden of argument for the prosecution. He did not know that he would be compelled to both open and close until a minute or two before it was so decreed. Under the circumstances, he acquitted himself with great credit. Captain Clarke was convicted upon seven of the thirteen counts against him.

On the trial of Harris, General Barnes also appeared, and, being held to the rule before laid down, he concluded to make the opening argument. His speech was reported fully in the *Post*, occupying fifteen columns. It was skillful in analysis, intrepid in arraignment and full of fine passages. Of the one hundred and six counts against Harris, the prosecution demanded conviction on seventy-one. He was convicted on twenty-four. Of the trial of

Malloney, it need only be said that he was convicted on one count and was sentenced to sixty days' imprisonment in the County Jail. Clarke was sentenced to fourteen months in the County Jail, and to pay a fine of \$1,000. Harris went to the State Prison for four years.

In January, 1874, in the U. S. Circuit Court, General Barnes was called into what is known as "The Crusader Case," being the trial of the officers of the ship *Crusader* on similar charges to those preferred against Captain Clarke and his mates. The crew of that vessel were Scandinavians, and the Scandinavian Society of San Francisco, having a large membership, took up the cause of the outraged sailors with vigor, employing General Barnes to assist the United States District Attorney to prosecute. After a long trial, the accused were convicted. For his masterly conduct of this case, General Barnes was knighted by Oscar, King of Sweden, who sent him the usual patent and jewels.

There is one advantage possessed by General Barnes which makes him feel perfectly at home in cases like those just noticed. It is his familiarity with the structure and furniture of vessels, and with the terms mostly used at sea. He knows as much as the average ship captain does about halliards, and fore royals, and studding sail booms, and main-cross-jack braces, and lazarets, and jib down-hauls, and mizzen tops, and leech lines, and jib sheet spreaders, etc. He knows every sheet, and stick, and rope on a ship. I am reminded of an impatient expression he hurled at me once in my boyhood days. I was taking down for a notary the deposition of a witness in a suit brought to recover on a policy of marine insurance. The witness was a sailor, and Barnes for plaintiff, and Highton for defendant, were letting fly nautical terms in bewildering profusion. Every few minutes I was compelled to ask how some word was spelt. Losing his patience, General Barnes suddenly said, "Where did you come from?" I told him where I came from. "Well, I guess," he said, "that salt water is worth ten dollars a quart in that locality."

He did not derive his nautical lore by following the sea, but owing to his fondness of the sea. He has been an enthusiastic yachtsman from his youth and has studied marine architecture, a most beautiful miniature specimen of which adorns his office. He has two brothers in the navy.

Horace Hawes, a California pioneer, died at San Francisco, March 12, 1871, leaving an estate appraised at \$401,000, consisting chiefly of city real estate. He had served in both branches of the State legislature, and won the reputation of a wise man. He was author of the San Francisco Consolidation bill. He practiced law for many years, but his wealth was accumulated from judicious investments in town lots and country lands. A repellant, suspicious, and eccentric man was he, tyrannical,

"Cold as the rocks on Torneo's hoary brow."

Hawes' will bequeathed to his widow \$2,500 per annum; to his only son, Horace, \$3,600 per annum; to his only daughter, Caroline, \$3,000 per annum; to his errand boy, Thomas E. Larkin, \$500; to his sister, Lydia, wife of Russell Martin, certain lands and a mortgage in Buffalo, New York; to Mrs. Mary Hawes, widow of Rev. Lawrence Hawes, \$6,000; and to Henry Ulman, banker, of Racine, Wisconsin, \$6,000 to be distributed to two brothers of testator, John and Isaac Hawes, and an aged aunt, "and other aged near relatives, if any there be to his knowledge who need it." The whole of his handsome estate, with the exception of the few legacies just mentioned, he bequeathed to two institutions which he hoped to create, but which were never called into being—the Chamber of Industry and the Mont Eagle University. Albert Hart, first librarian of the San Francisco Law Library, was named as executor, with Edward R. Sherburne as alternate, and the will was witnessed by Stillman N. Putnam and Alfred Clark. It was filed for probate April 11, 1871.

On May 9, 1871, the widow, by Gen. Barnes, J. C. Bates and Alexander Campbell, filed a petition in contest of probate, based on the grounds (1) that the instrument offered was not the last will of the deceased; (2) that Horace Hawes was not of sound and disposing mind, and was a person non compos mentis when the document was signed and long prior thereto; (3) that the document was not signed or attested as required by law, and (4) that if the alleged will was signed by Hawes, it was signed under restraint, undue influence and fraudulent misrepresentations.

The trial of this case opened November 14, 1871, and lasted two weeks.

Some ten or twelve attorneys appeared, but General Barnes was the principal counsel for the widow, while Judge L. E. Pratt, since District Attorney, was his chief opponent. The proceedings on the trial were reported in full and printed, making an octavo volume of 600 pages. Fifty-five witnesses were examined, many of them at great length. This great contest was watched with interest by the people of the whole Pacific Coast. The following short extract from General Barnes' speech to the jury will give a glimpse of the character of the man whose will he was opposing on behalf of a worthy widow:

Think of a man in his senses telling a witness to take a book and write down in it every word he said; that after his death it would be published, and a hundred years hence it would be read by more people, and with greater interest than the life and doings of Jesus Christ! Think of a man whose insane idea on the subject of his own greatness was such that when he read an account of a public meeting, and of a dinner where his Excellency the Governor of the State presided, and where gentlemen drank each other's health, and toasted everybody—he lay the newspaper down and said, 'Neither Jesus Christ nor I was ever toasted!' Gentlemen, I hope that Mr. Hawes was an insane man, for if he was not, if all these acts and doings of his were the product of a sane

mind, whatever complaint he may have made on the subject of not having been toasted on earth, he is getting plenty of it now. * * * * *

There was a belief of ancient times that insane men were under the special care of Providence; that the gods, for some reason, took away their senses, and made them what they were; and so the hands that harmed them were considered accursed. Treat him so. Don't let his children know, when they grow up, that twelve intelligent citizens determined that their father was a moral monster; determined that he was a demon; determined that he was a man who slandered, outraged and robbed their mother and themselves, and turned back, even from the grave, and, lifting his withered arm in triumph, told the "damned vampires" to do their worst! Let us deal with him in this spirit, and I have no fear, if you take with you to your deliberations the facts of this case, as developed by the evidence and the law as it will be given you by the court, that your verdict will be in accordance with the principles of justice, of right, of truth, and in the real interests of society.

The jury were not long in agreeing upon a verdict for the contesting widow. The latter paid to General Barnes a fee of \$30,000.

But a larger reward than this it was the General's good fortune to receive on another occasion. A rich client entered his office one day and asked him to personally conduct a certain business negotiation which involved \$300,000. He had to raise over \$300,000 on that very day, or fail—so he said. He offered the General ten per cent. if he could get him \$350,000. In two hours from that time the money was in hand, and the General pocketed \$35,000.

Those who knew the close relations the General had always had with our bankers will not doubt this story.

I recollect an incident in the career of my subject, which happened when I was in his office, about 1866, which deserves special mention. I think it is known to few, even among his professional brethren. The Bank of California and a certain wealthy man desired an action at law to be instituted and certain compromises effected in the Sandwich Islands as early as possible. The regular vessel carrying the mails and express—there were no steamers running to the Islands then—had sailed a few days before, and the suit must be commenced before the arrival at Honolulu of the next vessel, which would leave San Francisco about a week later. A very large sum of money was at stake. The problem was quickly and skillfully solved. It was half-past five o'clock in the afternoon when the matter was first laid before General Barnes. At eight o'clock that evening he was on board of the United States man-of-war Vanderbilt in this harbor, with \$100,000, and bearing a letter of credit for half a million more. It was known that the Vanderbilt would sail for Honolulu next morning, to take Queen Emma home. But the regulations prohibit men-of-war from carrying private passengers! In two hours and a half General Barnes had seen his family, collected his baggage, and been installed as captain's clerk on board the Vanderbilt! Early next morning

the ship steamed out of port, bearing the accredited envoy extraordinary of our largest bank on his important mission. In a month or so, after pleasant voyages, a delightful stay, and the successful execution of his plans, he was again in his office.

Very many other matters of interest might be recited about this counsellor personally and professionally, but they must be neglected. His lectures on "Our Boys," and other subjects, his orations on Decoration and Independence Days, and other occasions, at many points in California and Nevada, have always been graceful, thoughtful and eloquent. As a military man he is known all over the coast. He was long identified with the militia. For six years he was Colonel of the First Regiment, a position which exacted much of his time and means. He was later Major General in Chief, commanding all the militia of the State. In September, 1887, this rank and honor were again tendered him by Governor Waterman in a telegram, but he wired back a prompt declination.

On May 31, 1886, at San Francisco, Capt. Wm. H. Aiken was standing by Gen. Barnes as the First Regiment marched by in the Memorial Day procession. "See all those uniforms," said General to Captain. "See all that gold, et cetera, et cetera. It all cost me twenty-six thousand dollars," (alluding to what he had spent on the regiment when he was its Colonel.)

In the domain of art he is what is called "a wide liker." His father took him from the easel to send him to college. He is a musician, an ardent lover of the "concord of sweet sounds," and plays with skill the piano, cornet and other instruments. He speaks French as fluently as English, and is accomplished in Latin and Greek. He is, too, an ambidexter, the only true one I have met at our bar. His offices are sumptuously furnished, and his library contains five thousand law books and two thousand miscellaneous works. I asked him once who were his favorite authors. "I like all authors, and don't know which I like best," he replied.

Among the General's regular clients may be named the Bellingham Bay Coal Company, the Western Union Telegraph Company, and the great Pacific Railroad Company, the last mentioned paying him a salary of \$10,000 per annum. The resuscitation of the Bank of California was due to his efforts. The Directors had, after the failure of 1875, passed a resolution to go into bankruptcy. He urged them warmly to rescind this resolution, and to reconstruct the institution, and it was done.

Most noteworthy of all his great cases was the Sharon divorce case of 1884-5, in which he was the leading counsel for the defendant. The latter was owner of the principal hotel and much real estate in San Francisco, being worth about five millions of dollars. He had been a United States Senator for the State of Nevada. He had lost by death his wife, the mother of his

children, and in this divorce suit he denied that he was married to the plaintiff. She produced a paper which the Superior Court of San Francisco, in which the case was tried, accepted as and declared to be a contract between the parties by which they became and then were, united in marriage. Later, Mr. Sharon in a suit brought for that purpose, obtained from the United States Circuit Court a decree declaring that this alleged marriage contract was a forgery. He also appealed from the judgment of the San Francisco Supreme Court, and pending this appeal, he died on the 13th of November, 1885.

General Barnes in court attracts the general eye. His arguments are logical, his language chaste. Having a good voice, a fine presence, precise ideas and a lively manner, he always creates a good impression and leaves a pleasant memory. He is most effective before a jury. While calmly appealing to their reason, he is constantly throwing off witticisms for their entertainment. Although he sometimes addresses juries at great length, he is never tiresome; he never permits their interest to flag.

The General enjoys life, and if he did not, with his varied accomplishments and capacities, who could? Strong in physical build and mental grasp, keen in his perception of the beautiful, surrounded in his family by every material comfort, in fellowship with music, the bosom friend of art, successful in business, and diligent in the pursuit of knowledge, fortune has placed him on an enviable eminence.

CHAPTER XXVIII.

John S. Hager—A Tribune of the People—Summary of an Eventful History—Legislative and Judicial Record—Sailing to San Francisco Her Water Front—Notable Trials in the Early Troublous Times—The Great Adams Bank Failure—War Between E. D. Baker and Trenor W. Park—The Old "Gray Eagle" Disciplined—Case of Charles Cora, Hanged by the Vigilance Committee—The Contest Over Senator Broderick's "Will" (!)—Controversy over Judge Hager's Seat on the Bench—In the United States Senate—Historic Pages and Thrilling Scenes of the Long Ago.

This veteran tribune of the people has received many proofs of popular trust in his wisdom, capacity and integrity. One of the most signal of these was given when, in November, 1882, a great constituency, divided against itself in partisan warfare, called him, with one voice, to preside over the little congress that was to frame a new charter for the government of the Pacific metropolis. His early settlement in that community, his long life on the bench and in halls of legislation, the untarnished record he has made in every station he has been called on to fill, his enlarged experience, his business capacity, which has garnered an ample fortune, the high vantage ground he firmly holds between communism and great corporate wealth, all bespeak him one of the foremost citizens of the Commonwealth.

John S. Hager was born in German Valley, Morris county, New Jersey, March 12, 1818. His ancestors on both sides were German Protestants, who, being driven from their homes by the persecutions that took place during the religious wars that so long distracted their native land, first retreated to Holland, and from that country afterwards emigrated to America. They landed at Philadelphia in the year 1707, and with other German colonists finally settled on the south branch of the Raritan river, in an uninhabited portion of New Jersey, to which they gave the name German Valley, and where their descendants still reside. Their sons were among the officers and soldiers of the Revolution in the army of Washington. Judge Hager's grandfather was an officer in the war of 1812.

Born and reared on his father's farm, my subject entered, after preparatory training, the College of New Jersey, at Princeton, from which he graduated in 1836, receiving in due course the degrees of Bachelor and Master of Arts. His alma mater since conferred upon him the honorary degree of Doctor of Laws. He studied law at Morristown, N. J., under the direction of Hon. J. W. Miller, United States Senator from that State, being admitted to the bar in 1840, and commencing the practice at Morristown, the county seat, and there remained until his emigration to California. He came to this

State in the spring of 1849. In pursuance of the object he had in view when he closed his law office in Morristown, and in keeping with the course of many other lawyers who have since become distinguished in the profession, he went, after a few weeks' stay at San Francisco, to the mines, in what is now Nevada county. During the summer and fall of 1849 he was engaged in mining and merchandising on Bear River and Gold Run. In the fall of that year he made a trip with a six-mule team to Sacramento and San Francisco for supplies. During his visit to the latter city he concluded the State would be speedily settled by a large population, and he resolved to close his business in the mines and resume the practice of his profession in San Francisco. With his team and supplies, and two companions, he left Sacramento for his mining camp. The first night out, when about six or eight miles from Sacramento, on the plains between the American and the Feather rivers, they camped on a knoll, with the intention of resuming their journey next day; but during the night the rainy season commenced, rendering the roads impassable, and continued until the rising waters surrounded their encampment and submerged the entire plain. Both progress and retreat were impossible, and they were confined to their little island home. They "wished that little isle had wings," but were glad that an acre of terra firma was reserved to them from the wide waste of waters. In that plight they were kept for thirty days, exposed to the rain and cold. Owing to this exposure Judge Hager was for a long time confined to his bed by attacks of inflammatory rheumatism, from the effects of which he has never entirely recovered.

When the water had sufficiently subsided the party pushed on to the camp in Nevada county, when Judge Hager closed his business there and left for San Francisco, which place he again reached about the first of January, 1850.

He now resumed law practice, and soon had a profitable business, but he was not able to properly devote himself to it, on account of ever recurring attacks of rheumatism. He was walking on crutches one day in 1852, when a committee of citizens, on behalf of the Democratic party, waited on him, and informed him that that party had nominated him for the State senate. He was surprised, but not agreeably. He appreciated the honor, but did not want to serve. On being pressed he accepted, his associate being the late Elisha Cook. The city then had only two senators, the Whig nominees being John H. Baird and A. Bartol. One candidate on each ticket was elected—Judge Hager and Captain Baird.

In the State senate Judge Hager very soon exhibited that stern sense of duty which ever marked his career as a public man. Not to dwell upon his record, it may be stated that in the session of 1853 he defeated the famous

attempt to extend and grab the water front of San Francisco. The scheme was to extend the entire water front 600 feet, wholly in the interest of private parties. It was a colossal "job." It was defeated in the senate by a tie vote. Senator Samuel B. Smith, of Sutter, one of his companions in the mines, who was at first favorable to the measure, and who, before he understood it, had promised some of its friends to vote for it, after personal entreaty and explanation from Judge Hager decided not to vote at all, which left the senate equally divided. The bill had previously passed the assembly under the protest of the San Francisco delegation, whereupon the assembly delegation from that county resigned and appealed to their constituents to sustain them in their opposition to a measure supposed to be destructive to the city and its commerce. They were re-elected at a special election.

To aid in the passage of this jobbing business, deeds for an interest in the property, duly executed and acknowledged, with the names of the grantees in blank, were sent to members to be filled up with names, if they were so disposed, of their selection.

In 1855 Judge Hager was elected on the Democratic ticket District Judge of the Fourth judicial district for a full term of six years. His opponents were L. Sawyer, Whig, E. W. F. Sloan, Independent Whig, and Alexander Campbell, Independent Democrat. He received a majority of 660 over all his competitors. His judicial career was cast in troublous times—in the period of financial crisis, of the Knownothing agitation, of the great Vigilance Committee, the division of the Democracy, the uprising of the Republican party, political contests of unexampled excitement, fatal duels among prominent men, and other memorable events. It was during that time that the failures occurred of the great banking firms of Adams & Co., Page, Bacon & Co., and Saunders & Brenham.

Litigation during that time was enormous. Indictments for the higher classes of crimes, such as murder, manslaughter and arson, were mostly tried in the 4th District Court, of which he was Judge, and the records will show that more than sixty defendants charged with such offences were tried before him. He presided at the trial of some of the most important civil cases, perhaps, known to our courts. The most celebrated criminal trial in our annals (unless that of Mrs. Fair be excepted) was also before him. A few of the causes tried in his court will be noticed—those which attracted attention from beyond the State, and were attended with high public excitement.

Washington's birthday, 1855, in San Francisco, was one of patriotic jubilee, but was followed by a day of disaster to thousands, who, retiring to sleep with pleasant memories of the occasion, little suspected that—

"Upon night so sweet such awful morn could rise."

At the opening of banking hours on the morning of February 23, the doors of the great banking house of Adams & Co., were found closed. They were never to be thrown open again. The firm was composed of Alvin Adams, I. C. Woods and D. H. Haskell. The first named resided in New York City. Believing himself to be a special partner, he was yet a general partner under California laws. When the suspension was determined on (there was no overland telegraph then) friends of Adams in San Francisco, through counsel (Janes, Doyle, Barber & Boyd, and Hackett & Casserly) immediately instituted suit in his name, in the District Court of the Fourth Judicial District, then presided over by the late Judge Delos Lake, against his partners, Woods & Haskell, to dissolve the partnership and to have a receiver appointed to administer the property and effects for the benefit of the creditors. Mr. A. A. Cohen was appointed receiver by Judge Lake, and gave a bond in the sum of one million dollars.

During the pendency of this suit the company, by their firm name, made application to be discharged as insolvent debtors, and A. A. Cohen, Edward Jones and Major Richard Roman were appointed by Judge Lake as assignees, and the money, etc., in the hands of Cohen, receiver, was, by order, turned over to these assignees. The proceedings in insolvency were declared to be informal, and were dismissed. On the 8th of October, Judge Lake having resigned, and being succeeded by Judge Hager, the latter appointed General H. M. Naglee to succeed Mr. Cohen as receiver, and made an order that the assignees in the proceedings in insolvency should pay the funds, etc., in their hands, to Receiver Naglee. This the assignees refused to do, and were adjudged guilty of contempt. Upon an appeal to the Supreme Court, this order was finally affirmed and the money was then paid. Mr. Cohen had accounted for about \$150,000 of coin, gold dust and bullion. General Naglee brought suit against him to recover the sum of \$400,000, which, it was alleged, the first receiver had collected above the amount accounted for by him. The trial came off before Judge Hager and a jury in March, 1856.

The history of the failure of Adams & Co., and of events incident thereto, possesses the fascination of romance. The curious will find many singular revelations in the local newspaper files of January, March and April, 1855, March and November, 1856, January and December, 1857, and in the California Supreme Court reports, volume 5, page 494, and volume 6, pages 316 and 318.

The jury rendered a verdict against Mr. Cohen for \$269,000.

The trial was one of the most exciting civil contests in our history, and aroused the passions of experienced counsel. Mr. Trenor W. Park and the late Edward Stanly argued the case for the plaintiff, and General E. D. Baker and Mr. S. M. Wilson for the defendant. The "Old Gray Eagle,"

usually so refined and courteous in debate, seems, on this occasion, to have partially lost his head, while holding on to his eloquent tongue. He was aggressive, belligerent, even savage. He attacked all who came within his reach—James King of William, Trenor W. Park, and even the Judge on the bench. The latter fined him \$100 for contempt. In his address to the jury he sought to retaliate upon his honor first by occasional innuendo, striving to irritate while keeping within the doubtful limit of propriety. He then indulged in open contempt, telling the jury that his honor's decisions were invariably wrong, when, in fact, the Supreme Court had up to that time substantially sustained Judge Hagar in his judgments involving the affairs of Adams & Co. In his charge to the jury the Judge took occasion to allude to the conduct of counsel in the following language.

"What may have been the motive of counsel in the attack made upon the court during this trial I know not. If done with a view of making a favorable impression upon your minds, I can freely accord all the advantages gained; but if it has only tended to produce a contrary effect, I would caution you not to visit upon the client the errors and improprieties of his counsel. If it has been made from a belief in the truth and justness of the charge, I can forgive it; for there is a monitor within me which not only assures me it is untrue, but acquits me of doing anything, in this or other proceedings against the defendant, beyond what a conscientious discharge of an unpleasant official duty required of me. If it has been made from any other motive less commendable, I can only hope that the counsel may live long enough to see the impropriety and to regret it. It has produced in my mind no stronger feeling than that of regret, that a counsel who aspires to a leading and respectable position at the bar should forget the duty, respect and subordination due to a court of justice; and it has served greatly to diminish the respect I have entertained for a member of the bar, for whom I have cherished no unkind feeling, who is sufficiently gifted to be elevated far above the necessity of resorting to such unbecoming and extraneous aid."

When the Judge had finished his charge, Baker arose and expressed the hope that the court, in justice to his associate, (Mr. Wilson), would name him (Baker) as the party against whom the personal animadversions were directed.

The court said it had merely intended to reprehend such improper conduct of counsel as had occurred during the trial and which no doubt was understood.

Mr. Wilson excepted to the whole charge, and to each individual portion of it, on the ground that its criticisms on the conduct of counsel were misplaced and improper.

In Trenor W. Park, Baker found a foeman worthy of his steel—that is, in the line of personal attack. Park had "the close on him," and made the most of his opportunity. He made a fine and elaborate argument, promising that he would not attempt to amuse the jury with ridiculous charges against innocent parties, nor try oratorical flourishes. Baker had, in his

speech, used a strange expression, coming from one who, three years later, uttered the noblest and most eloquent protest against dueling ever made by man. He said that if Park was displeased, he (Baker) was ready to "fight." Park in reply gave him this:

"A cheap exhibition of courage, if he meant he was ready to fight a duel. He knew that a year ago I had announced that I would not accept or send a challenge. My early education taught me to believe this mode of settling difficulties to be wicked and barbarous. The laws of my native State—the good old State of Vermont, still dear to me though far from here—have pronounced dueling a crime. I have not forgotten the instructions of the earliest and best of friends. I have not lost my respect for the best citizens of my native land. I am not prepared to abandon long cherished principles—to forget obligations of the highest character, in the idle expectation of protecting wounded honor. And I can't say that, if I were ready to adopt the code the gentleman seems disposed to consult—that, if I were ready to die as the fool dieth—that I feel so much hurt by the gentleman's assault, as to regard it necessary for my vindication to resort to that mode of settling controversies. I would inform counsel—I mean Colonel Baker; his associates, Mr. Wilson and Mr. Aldrich, have, as is usual with them, conducted this case like gentlemen, respecting themselves and entitled to the respect of others—I inform the counsel, who seems so well to understand how to blow his own trumpet, that I should not feel greatly alarmed if any comparison were made between his character and the character of any of those whom he has assailed. Who are his associates?

But I must stop Mr. Park at this point. It is pleasant to close the notice of this memorable trial with a couplet of doggerel, improvised by Hon. Edward Stanly, who opened the argument. In the office of the receiver (General Naglee) Messrs. Stanly, Park, Baker and Wilson met to inspect a certain book of Adams & Co. The volume had been found floating in the waters of the bay where it had been thrown to destroy the evidence it contained, and was of such immensity that it was laid open upon the floor. The counsel, unbending for the occasion, knelt around it. Referring, in his argument, to the unusual sight, Governor Stanly said:

"Sin, for a fleeting season, bade the State farewell,
And Satan shrieked as on their knees four lawyers fell."

On the evening of the 17th of November, 1855, General William H. Richardson, the United States Marshal, was shot and killed by Charles Cora on the sidewalk on the south side of Clay street, a few yards west of Leidesdorff. The parties had had a dispute at the Cosmopolitan late on the preceding night. The witnesses to the shooting were few and their evidence unsatisfactory. As to which party was the aggressor was left in doubt. Cora was a man of vicious surroundings, and as to the character and disposition of General Richardson, the testimony was in substantial conflict. It was on this occasion that Col. Baker made, in the face of a storm of popular indignation, his most brilliant plea in defense of a prisoner's life. The defense was permitted by the prosecution to assail the character of the deceased, and its

evidence on this point was opposed by counter testimony. Judge Hagar's charge can be found in the local journals of January 18, 1856. It is worthy of mention that he took occasion to declare that the statute requiring judges to deliver their charges in writing, was, in his judgment, improvident, and perhaps unconstitutional. The charge was lengthy and explicit—an admirable exposition of the law of homicide. I have hardly room to quote, but make place for this:

You are not here to ascertain whether or not several years ago Richardson was a low character engaged in disreputable pursuits at Matamoras or Tampico, or a gallant soldier fighting the battles of his country; but to investigate the circumstances which led to his death—not the death of the gallant soldier—not the death of the Marshal of the United States, or that of the frequenter of gambling houses on the Rio Grande—but one of your fellow citizens—to inquire whether a public offense has or has not been committed, and whether or not Charles Cora, the prisoner at the bar, is guilty of the offense. It has been very justly remarked, that it would be a most barbarous thing to allow a person to give in justification for killing another, that his disposition was violent and savage. In the eye of the law, to murder the vilest and most degraded of the human race is as great a crime as to murder the most honored and distinguished.

In conclusion, permit me to remind you of the solemn duty that now devolves upon you. The life of a citizen is involved in the issue submitted to you. While attentively examining the evidence, and seeking for every circumstance that will extenuate or excuse the offense charged against him, you must not forget that in the very heart of our city, in one of our most public streets, in the very midst of busy life, a citizen has been deprived of life by the hand of violence. Whilst you should be cautious not to condemn the innocent, you should not set the guilty free.

It was no fault of the Judge that the jury did not agree. He kept them out two nights and one day, and only discharged them after a second urgent request in writing. They stood four for murder in the first degree, six for manslaughter and two for acquittal. Cora was remanded to jail. Before he could be brought to trial a second time the great Vigilance Committee took him out of his cell, from the custody of Sheriff David Scannell, and hanged him.

In 1859 there was tried before Judge Hager, with a jury, the case of Hodges and wife against the eminent surgeon, Dr. E. S. Cooper, a case notable as being the only one ever tried on this coast wherein damages have been asked for malpractice in the performance of the *cæsarian* operation.

The plaintiffs alleged that on the 8th of November, 1857, Mrs. Hodges was at the period of labor, and that the defendant, by reason of his want of medical or surgical skill, protracted her labor for sixty hours, and then, without necessity, performed the *cæsarian* operation, and performed it so unskilfully that the child was killed, the mother's life endangered, and her general health injuriously affected. They asked damages in the sum of \$25,000.

[Dr. Cooper, a native of Ohio, distinguished in anatomy and surgery,

died in San Francisco in 1862, and his friend and disciple, Dr. Levi C. Lane, succeeded to his immense practice. An interesting sketch of his career by Dr. Lane, with a poem by the late T. G. Spear, may be found in my "Representative Men."']

Dr. Cooper, in his answer, denied all the material allegations of the complaint, and alleged that the operation (called "caesarian" from the supposed manner in which "the foremost man of all this world" was brought *into* the world) was a necessary operation. The late Edward Stanly conducted the case for the plaintiffs, and Gen. McDougall for the defendants. Drs. Toland, Coit, Ayer, and many other physicians, were examined as experts. Judge Hager's charge to the jury was one of the most careful, learned and elaborate of all his many charges. It was printed in pamphlet form. The jury stood six to six, and the case then died. The phonographic report of the trial, covering 250 pages, was sent to the leading medical magazine of the East, which, becoming greatly interested in the case, published its reflections under the heading, "Awful Case of Malpractice." It declared the case was horrible beyond any in the history of the medical profession. "We have been forced," it warmly declared, "on a fair analysis of the evidence, to the melancholy conviction that the operation was not ignorantly, but wantonly performed, and for reputation alone. * * * The chamber of the parturient woman is as sacred as the grave of a dead mother, and every act there performed by the surgeon should be weighed in his conscience as though the spirit of that mother looked down upon him."

The operation may have been unnecessary, but it was proven to have been skillfully performed, and one-half of the jury could not see wherein the mother had been injuriously affected in her health. The little Macduff came into the world lifeless, but the jury could not agree as to whose fault *that* was.

David C. Broderick, a United States senator from California, fell in a duel with David S. Terry, near the city of San Francisco, and died a few days thereafter, September 16, 1859. He left an estate in San Francisco of the value of about three hundred thousand dollars. It was generally believed that he left no kindred; in fact, he was reported to have so declared a long time before his death. During the few days which passed between his injury and his decease, he said nothing in regard to having any kin, or having made any will. After his death a thorough search among his papers and effects was made, but no will was discovered, and the public administrator took charge of the estate.

On the 20th of the following February John A. McGlynn and Andrew J. Butler presented to the Probate Court and had filed for probate a document which purported to be the last will and testament of David C. Broder-

ick, in which they were named as executors without bonds, in connection with George Wilkes of New York City. It disposed of the entire estate in two brief paragraphs—to John A. McGlynn was given \$10,000, to George Wilkes the residue.

On the day appointed for hearing the application of McGlynn and Butler for letters testamentary, various persons appeared, claiming to be heirs, and contested the proposed paper on the ground that it was forged. The trial was set for June 18, 1860, when it was commenced, and it continued until October 8th following. Many witnesses were examined, and depositions were read of persons residing in New York. On the date last given, the Probate Court (Judge Blake) held the alleged will to be genuine, admitted it to probate, and appointed McGlynn and Butler executors without bonds. Appeals were taken by the claimants, or those declaring themselves to be heirs, which were dismissed for want of prosecution. (It would not puzzle the average lawyer to guess why the prosecution was wanting.)

The executors, in the course of administration, obtained an order of court authorizing them to sell, either at private or public sale, the whole or any portion of the estate. The sale was advertised for November 30, 1861. On November 29, 1861, the Attorney General, Thomas H. Williams, on behalf of the State, and on the relation of Frank M. Pixley, Esq., Attorney General elect, but not yet in office, filed in the Fourth District Court an *information* alleging that Broderick had died intestate and without heirs, and that his estate had escheated to the State of California. On the same day he commenced, in the same court, a suit in equity to obtain an injunction against the sale of the estate by McGlynn and Butler. A temporary restraining order was issued pending the information.

On the hearing it was claimed by the plaintiff that the forgery was accomplished after this manner: Butler, who was in this State when Broderick died and afterwards, conceived the job, and, going to New York, confederated with Moses E. Flanagan, James R. Maloney, George Wilkes, John J. Hoff and Alfred A. Phillips. Flanagan, who had been in the habit of using, by consent, Broderick's senatorial frank, wrote simulated signatures on several sheets of paper. Phillips wrote the will above one of those signatures, and he and Hoff signed their names as witnesses. It was not disclosed where the alleged will was discovered. It purported to have been made in the city of New York on January 2d (Sunday), 1859.

McGlynn, who was not charged with the forgery, was the only defendant who appeared. He denied, on information and belief, all the allegations of the complaint. His defense was that the will was genuine, and that the decree of the Probate Court admitting the document to probate was final and conclusive, and could not be questioned by any other court—under the

statute which provided that, after the lapse of one year from the probate of a will the probate shall be conclusive.

Judge Hager held that this statute did not preclude courts of equity from setting aside wills, the probate of which had been procured by fraud. He said:

It seems like an anomaly in law that by any course of reasoning, based on principle and legal authority, we should attempt to establish the validity of a forged will, which is of itself a nullity, or of its probate, procured by fraud and perjury; and if successfully done, I fear it would be a reflection upon our institutions and a stain upon our jurisprudence. * * * It is urged that equity will not interfere, even if it be established that the will is a forgery, and its probate procured by fraud and perjury. If this be sound in principle and supported by authority, we deduce a controlling principle of law to the following effect: That if a person successfully consummates the forgery of a will, and by fraud and perjury gets it admitted to probate, and for one year thereafter conceals the evidence of his crime, he may acquire an estate. If the legal heir be absent from the country, and does not know or hear of the death of his relative during the year following the probate, for the same reason he must lose his inheritance. The forger might be punished for the public offence * * * but he would hold the estate, and the heir would lose it. Public justice might be vindicated, but the inheritance would be despoiled, and our courts would be inadequate to grant relief. Such a principle would seem to be in violation of natural justice, absolute rights and public policy. * * * I am not able to understand why a forged will should be placed upon any footing different from a forged deed.

Having declared that the only satisfactory evidence in the case was that evinced by the will itself, Judge Hagar proceeded:

An inspection of the will discloses to the senses some peculiar phenomena, and many remarkable visible signs that are suggestive and circumstantially strong, against the probable truth of some of the defendants' evidence. It is manifest to the eye that, in the signature "D. C. Broderick" and in the words "John J. Hoff, 131 and 133 Washington street, Hoboken, N. J.," the ink of the one is of a darker tint than that of the other, and that both are much darker hued than the writing composing the body of the document and the certificate of attestation. In the last mentioned instance it is so demonstrable, upon mere inspection, that I can hardly suppose the entire document and signatures were written on the same occasion, at the same table, and with the same ink, as we are led to infer was the case from the testimony of Phillips and Hoff.

The will consists of one sheet of letter paper; the signature is on the third line of the second page, and is succeeded by the certificate of the subscribing witnesses.

The body of the will contains twenty-one lines of manuscript. Of these, eighteen are entire lines, without interlineation. As the lines approximate the signature the letters become gradually and very perceptibly smaller, and the words are more condensed and crowded, and in the last line a few of the words are carried beyond the marginal line, which is the only instance where it occurs, either in the body of the will or the certificate. * * * These phenomena, so remarkable and extraordinary, apparent upon the face of the will, and established in some respects with the certainty of a mathematical demonstration, are unexplained, and, in view of the evidence, cannot upon any reasonable hypothesis be attributed to chance or accident. The ordinary manuscript of a scrivener would scarcely ever exhibit such marked peculiarities. If, however, as

some of the evidence tends to indicate, the name D. C. Broderick *was first written*, and that alleged signature and the initial line on the first page formed a Procrustean bed, in which the body of this alleged will was placed and made to conform to it, we have a solution.

The judge ordered the injunction issued as prayed for. McGlynn appealed, and a memorable argument followed before the Supreme Court. Messrs. Hoge and Wilson represented the appellant, and succeeded in upholding the will. Judge Hager's injunction was dissolved. James B. Haggin represented the self-declared heirs-at-law, and Gregory Yale fought like a Titan for the lost cause. The following vigorous extract is from Yale's brief:

The great effort is now, and always has been since the accidental probate of this felonious paper, to take shelter behind a formal decree legalizing the felonious act. Will or no will, when propounded for probate it is claimed that it became an immaculate testament when solemnized by certain forms. Broderick may not have made a will, but Butler, with his co-conspirators, has secured the Probate Judge's name, if not D. C. Broderick's, to the paper, and no human power can detach it. This is the doctrine that this court is called upon to sanction. Years and generations hence, the term of 1862 is to be signalized—as the forgers and speculators would decree it—as an epoch in the legal history of this great State, when its highest tribunal pronounced in favor of an unmitigated fraud, only because an inferior tribunal had sanctioned it, and because the law afforded no escape from its own machinations. Such reflections upon the law are unwarrantable, unworthy of any civilized code, and humiliating to listen to."

The Supreme Court refused to interfere with the probate of the will, on the ground that the decree of the Probate Court (M. C. Blake, Judge), was final and conclusive, the statutory period of one year having elapsed since its probate, and not subject, except on an appeal to a higher court, to be questioned in any other court, *or be set aside or vacated by a court of equity on any ground*. (20 Cal., 234).

The estate was accordingly sold, and distributed in pursuance of the terms of the WILL!

It might here be remarked that in public estimation, the so called Broderick will has long since been pronounced a forgery; and in the history of enlightened jurisprudence, it stands as a solitary instance where a will alleged to be forged has been upheld because courts exercising equity jurisdiction were inadequate to give relief, even if the fraud should be established by proof.

The indictment of Judge David S. Terry for fighting a duel with Senator Broderick, came before Judge Hager for trial in the 4th District Court; when, under the statute, the defendant made a motion supported by affidavits, to change the place of trial.

The motion was granted, and the case was sent to Marin county. Judge Hager, in granting the motion, referred to the high position of the combatants,

the exciting political canvass which preceded the duel, and the public character of Broderick's funeral, declared that he did not believe there was an intelligent person in this community who had not formed an impression which it would require evidence to remove, and it became merely a matter of official duty under the statute to change the place of trial.

On the 2d of January, 1859, Judge Hager on entering his courtroom at ten o'clock, A. M., to commence the business of the day, saw his judicial seat occupied by Caleb Burbank, Esq. Taking in the situation at a glance, he remarked, while still standing, that a question had arisen in regard to the tenure of the office of District Judge of the Fourth District, which would have to be settled by the Supreme Court, and until that was done no business ought to be transacted. He then directed the Sheriff to adjourn court for one month.

The officer declared the court adjourned accordingly. Judge Burbank then announced from the bench that the court was *not* adjourned, but the *fact* seemed to be otherwise. Before withdrawing, Judge Hager good humoredly said to Burbank, "Judge, I am really surprised at your taking my seat from me in this manner, especially as I bought the very chair you are sitting in at my own personal expense."

The trouble was this—at the general election in 1852, Delos Lake had been elected Judge of the Fourth District Court for six years from the first day of January, 1853. In June, 1855, he resigned, and the Governor appointed Judge Hagar to fill the vacancy until the general election in September, 1855. In July of the latter year the Governor issued his proclamation for the election in September, in which he included this office; but he styled the officer to be elected a District Judge for the *unexpired term* of Delos Lake, resigned. The Board of Supervisors gave notice in the same way. Judge Hagar was elected, and was commissioned for the *unexpired term of Delos Lake*, which unexpired term would end December 31, 1858. At the general election in the fall of 1858 Caleb Burbank ran for Judge of the Fourth District Court, and received a majority of the votes cast for that office. He was commissioned by the Governor in due form, qualified, and entered upon the office.

The constitution declared that the term of a District Judge was six years, but the legislature, by various acts, seemed to regard this as applying only to terms which had not been preceded by a vacancy—that is, the lawmaking power acted on the theory that if Judge John Doe resigned two years and a half before the end of his term, and a general election would take place six months after his resignation, the Governor's appointee would hold until the next election, and the Judge chosen at that election would hold for two years.

Against this theory, it was ably contended by leading lawyers that there was no such thing as an unexpired term of a District Judge—that upon a resignation the Governor's appointee filled the vacancy until the next general election, and that every District Judge, *elected by the people*, held for six years.

Judge Hager adhered to this last view, but he did not desire any contest over his seat. He would have let Judge Burbank take the office but for the fact that John B. Felton and other leading members of the bar volunteered to contest the question, or, in other words, they told him if he did not do so, they would. The matter was taken before the Twelfth District Court (Edward Norton, Judge), where pro forma decision was made that Judge Burbank was entitled to the office. An appeal was taken by Messrs. Felton and McAllister, and it was argued in the Supreme Court by those gentlemen for Judge Hager, and by Messrs. Hoge & Wilson for Judge Burbank. The Supreme Court awarded the office to Judge Hager, and he served out the term. (12 Cal., 378).

Since retiring from the bench Judge Hager has made three trips to Europe and spent about three years in traveling through portions of Europe, Asia and Africa.

About a year and a half after his first return home from abroad, he was elected as a Democrat, in 1865, to the State senate, at a special election, to fill a vacancy caused by the resignation of John H. Redington. His Republican opponent was William H. Sharp, the lawyer. Two years later, he was elected for a full senatorial term of four years. He has served in the State senate during five sessions, and, during the greatest part of his service he was Chairman of the judiciary committee, and all of the most important bills went into his hands. He voted against all subsidy bills, including the proposed San Francisco million dollars donation to the Southern Pacific Railroad—on the ground that subsidies are wrong in principle, that the legislature has no right to tax the people to build railroads for private individuals. He it was who killed the proposed new charter for Oakland, at the session of 1867-8. The bill had passed the assembly, and coming to the senate Judge Hager asked for time to consider its merits. Its consideration being postponed, he examined it closely, with the employed assistance of a civil engineer, who drew a chart of the Oakland water front as it then was and as it would be under the proposed charter. The *chart* spoiled the *charter*—the iniquity of the proposed measure was revealed. Nearly the whole of San Francisco harbor was to be given to Oakland. The new charter line ran across the bay to Hunter's point, thence closely along the San Francisco wharves and took in Goat and Alcatraz islands and all the anchorage ground in front of the city of San Francisco. Nor would San Francisco's loss have been Oakland's gain. The whole territory granted by the proposed bill

would have gone into private hands—that is, to those who claimed the Oakland water front, as the grantees of that city, to whom by the terms of the bill it was given.

He was chairman of the joint committee of the senate and assembly on the bills to establish the University of California. He was the friend and advocate of the University, and materially assisted in the passage of the bill establishing that institution; also, was he instrumental in obtaining appropriations to defray the expenses of the University and for its endowment. He never neglected an opportunity to aid in promoting the efficiency of our common schools, and his zeal in the cause of popular education has been constantly exhibited throughout his long legislative career.

In 1872, Judge Hager was elected United States Senator to fill the vacancy caused by the resignation of Hon. Eugene Casserly. At the same session Hon. Newton Booth was chosen for the long term, to follow Judge Hager. It will be recalled there was unexampled confusion in politics at that time. Messrs. Booth and Hager were elected as anti-monopolists. Hon. James T. Farley, Democrat, was pitted against Governor Booth, and Hon. Jas. McM. Shafter, Republican, against Judge Hager.

It has been publicly asserted that Hon. John F. Miller is the only man ever elected to the United States senate who did not personally visit the capital pending the election. It is a fact that Judge Hager remained at his home in San Francisco during the whole of the session at which he was elected Senator. He resisted all importunities to visit the capital. He was mentioned in caucus as the long term candidate against Booth, but specially requested the withdrawal of his name. This was done, but he was, as stated, chosen in Democratic caucus for the short term, an event he did not anticipate.

He served two sessions in the federal senate, serving on the committees on Pacific Railroads, Territories, and Patents. True to his anti-subsidy principles, he made his influence powerfully felt in the committee first named. Several subsidy bills were referred to that committee, and their favorable recommendation defeated by a tie vote, the Judge voting and speaking against them all.

In the senate of this State he had voted for the Thirteenth Amendment to the federal constitution (abolishing slavery). In that body he had voted against the Fifteenth Amendment (universal suffrage). On the latter question he delivered a well considered, forcible and dispassionate speech, in which he treated his theme with a fullness of investigation, a breadth of view and a logical power highly creditable to American statesmanship. In the senate of the United States he took occasion to quote from this speech in his remarks on the "Louisiana Case." He then proceeded to observe: "Although entertaining these views at that time, I bow to the supremacy of the consti-

tution, and accept the negro as a citizen and a voter, and as our equal before the law. I am willing to give him words of encouragement, and, if he proves himself our equal physically, mentally and intellectually, I will rejoice. If he outstrips us in the race for supremacy, I shall be willing to yield him the palm!"

During the two sessions of the 43d Congress while he was a member of the senate, he largely engaged in the current debates, and his speeches on Chinese immigration, the currency question, the Louisiana case, involving the admission of Pinchback, colored, as a senator, and various other topics, are fully reported in the "Congressional Record."

Judge Hager became a regent of the State University soon after its establishment, and has ever since continued such. He is punctual in his attendance at meetings of the Board of Regents, and has always manifested a deep interest in the prosperity of this institution of learning, which has become the pride and glory of the State. He is a life member of the Society of California Pioneers, and has been a trustee of the San Francisco Free Library since its establishment. Since he returned from the federal senate he was elected from the State at large as a member of the Convention to form a new constitution for the State of California (1879). He was no drone in that body, but was an active, intelligent worker and thinker. The printed minutes of the proceedings and of debates show the thoughtful consideration which he gave to all propositions which came before the convention, and they testify to his readiness in debate, the correctness of his judgment, and the wisdom of his counsel.

It should be added that he was an active member of the Committee of One Hundred, which in 1871 was organized to oppose the acquisition of Goat Island by the railroad company, and to promote the scheme of building a people's transcontinental railroad to compete with the Central Pacific.

Judge Hager married in October, 1872, at St. Louis, Missouri, the daughter of James H. Lucas, one of the most opulent citizens of that city, who was the capitalist of the banking-house of Lucas, Turner & Co., for a long time doing business under the management of General Sherman in San Francisco. He has two children, having lost one. His wife's father was a son of John B. C. Lucas, who was born in Normandy, France, 1762, emigrated to the United States and settled in Pennsylvania, represented that State in Congress, was appointed by President Jefferson Judge of the United States court in Upper Louisiana, and who died in St. Louis at a great age.

When in 1882 the two great political parties wisely agreed, through their representatives assembled in conventions, that a new charter was needed for the government of the city and county of San Francisco, and that the body of freeholders to be selected to frame that instrument should be lifted above the atmosphere of partisan strife, having each designated seven

men out of fifteen freeholders as members of the Charter Convention, they united, without one whisper of dissent, upon Judge Hager, as the fifteenth and crowning constituent of the body. He was elected and served as President. And all the people said, Amen!

Judge Hager's latest public trust was the office of Collector of Customs at San Francisco. To this he was appointed by President Cleveland in 1885. The appointment was a surprise to him, but he accepted and took charge of the Custom House on November 2, 1885. He served three and a half years, resigning immediately after the inauguration of President Cleveland's successor in March, 1889.

The Judge is a man of grave aspect, quiet demeanor, deliberate in speech, exact in expression, of vigorous mental activity, given to contemplation, and his flow of thought is clear, deep, and strong. He is exceptionally judicial in his temperament, his jury charges and his opinions from the bench manifesting a poise of judgment which few men possess.

Physically he is a fine specimen of manhood, standing six feet high, with a shapely head, and powerful yet symmetrical frame. His ancestors were distinguished for longevity—his father attained the age of eighty-two—and now in 1889, at the age of 73, the Judge seems to have just reached the prime of life, and many golden summers, in the ordinary course of nature, would seem to be in store for him. Blest in his home and surroundings, honored by his fellow men, having all earthly delights within his grasp, yet simple in his tastes and moral in his habits, possessing the art of using the world without abusing it, his life is full of instruction, and his example is "a bright and shining light."

CHAPTER XXIX.

W. W. Stow—Our Only Whig Speaker of Assembly—A Carefully Drawn Pen Picture by Rev. J. H. C. Bonte—A Remarkable Man with a Long Period—An Analysis by a Student of Character—The Secret of His Great Power in Politics and Legislation—An Amusing Story of an Early-Day Law Trial.

Although Mr. Stow was the first public man I ever knew, I have never known him other than as he is known to the public. His character, however, was studied some years ago by Rev. J. H. C. Bonte, and I shall present to my readers that gentleman's delineation, by his kind consent promptly accorded.

I may premise a little. I was a looker-on in the lower house of the legislature as far back as January, 1855, when Mr. Stow, a member from Santa Cruz County, was escorted to the Speaker's chair and took the gavel. It is the only instance in our history of a Whig in that position. He had been in the same body at the session of 1854, one of ten Whigs out of eighty members, and voted for B. D. Horr for speaker against Charles S. Fairfax, Democrat, who received sixty votes.

When Mr. Stow was elected speaker in 1855, it was upon the third ballot. The Democratic caucus nominee was Asa Kinney, of Plumas. The first and second ballots stood Kinney 35, Stow 32, scattering 6; the third ballot, Stow 38, Kinney 34.

Mr. Stow is a native of New York State and was born in 1824. A year or two after his election to the speakership of the assembly, as stated, he removed from Santa Cruz to San Francisco and formed a law partnership with Harvey S. Brown, which continued a few years. He then associated himself with William H. Patterson, and the two were shortly joined by William T. Wallace who had been Attorney-General and who came from San Jose. The combination was a formidable one, and during its existence Mr. Stow did his principal work as a practicing lawyer. It terminated upon General Wallace's elevation to the Supreme bench. Mr. Stow and Mr. Patterson separated in 1871, a few years before the latter's death, and the former has since been alone in his legal practice.

I now present Mr. Bonte's picture:

Several weeks ago, while analyzing senators, I determined that I would study W. W. Stow, who is certainly one of the remarkable men of the Pacific Coast. At first I was daunted by the difficulties in my way, but my desires increased with the obstacles to be overcome, and I now rejoice in a reasonable degree of success. That my readers may consider the opportunities enjoyed, I will explain how I captured Mr. Stow. I knew very well that any formal effort to interview him would end in discomfiture, and

besides, I was not willing to practice actual deception. I therefore abandoned for the time my intention, and determined that I would obtain from him some information that might be useful in my book upon California, hoping all the time that something would occur to assist me in making an analysis of the man himself. I made known my wishes, and he at once consented to impart any information that might be in his possession. I have now had altogether a score of conversations with him on a wide range of topics, and have accomplished both of my objects. I shall not report these conversations, but I garnered an amount of information that surprised me, and in due time shall make use of the valuable material obtained in this way. The reader will notice, therefore, that my impressions of Mr. Stow are based upon social converse. And in this connection I desire to call to mind the well-established principle that character is more accurately discovered in trifles than in prominent actions, for the reason that we are more natural and unconscious in the former than the latter. My analysis of Mr. Stow will not satisfy either his friends or his enemies, but he is public property, and therefore subject to the impertinent demands of the student of history.

I begin with the outer man. Mr. Stow is about fifty-five years of age (in 1880) is nearly six feet three inches in height, and weighs a trifle over two hundred pounds. His flesh is evenly distributed, and he appears, therefore, to be an exceedingly well-made man. That he possesses remarkable powers of endurance is evident to any ordinary observer, and I would expect him to excel in mountaineering. He has an oblong head, steep on the sides, high above the ears, and it is well-balanced and strong in the intellectual faculties. He has auburn hair, a long face, a long, straight nose, light blue eyes, a reddish moustache, and a heavy chin beard of the same color. His complexion is ruddy, and he has a warm look about him. A gentle stoop in the shoulders, a slow, deliberate, easy walk, with an unused cane, and an air of abstraction, suggest the idea that he is a contemplative student; and when he leans up against a pillar, stroking his beard, the observer is confirmed in the opinion that he is in the presence of a close student. This impression is deepened by the neat, subdued tone of his attire. When he changes position, and moves to some other locality, he appears to be dragging after him a train of difficult problems. This general tone of the man's bearing is sometimes brought into bold relief when some local politician comes into the senate-chamber, head up, pushing and blowing his way, and beckoning grandly to the railing some page. And when a score of these magnificent bustlers come in together, the quiet observer feels that it is about time for that modest student to retire.

At first I supposed that he was unapproachable, but I soon discovered that all classes of men found him accessible and quietly affable. This much was learned by watching his movements in the corridors of the Capitol. To my surprise our conversations opened up the subject of my studies amazingly. In fact, I never saw a man who unfolded so thoroughly in mere conversation. Mr. Stow has a gentle voice, a quiet smile, an exceedingly pleasant manner, and I therefore found it easy, in accordance with my rule, to give myself cordially to the intercourse of the hour. Mr. Stow is in every respect an admirable conversationalist. No effort whatever is needed to enforce the point in hand, for the reason that he comprehends the idea advanced before it is half uttered. He is so quick of perception that you wonder if he abstracts thought by animal magnetism.

He certainly absorbs ideas by inoculation, as well as by reasoning. This subtle power of perception, this instructive apprehension, is the basis of conversation considered as a high art, and I have in a wide experience met only three men who possessed this faculty in a very high degree. Tom Corwin, the great orator of Ohio, was one; Dr. Alcott, the great Emersonian conversationalist, was another; and Mr. Stow is the

third. I would not, however, have my readers feel that Mr. Stow is a loquacious man, for he is not. On the contrary, he is a man of few words. He is somewhat restless in manner, but he is never inattentive. A better listener I have never met, and this trait in him enables me to understand the meaning of Henry Clay, when he said that he owed much of his success to the fact that he was the best listener in the United States senate. I would call Mr. Stow in conversation an inspiring listener. He is well read upon all general topics, and possesses in a very high degree the power of generalization, without which conversation soon ends in a stubble of lifeless facts. This faculty enables him to converse easily upon unfamiliar subjects. A new topic is speedily absorbed by him, and he is then able to throw new light upon the discussion by his power of generalization.

He is thoroughly sympathetic in his nature, and is easily touched by human wants, and I venture the assertion, with perfect confidence in its accuracy, that Mr. Stow is easily moved to practical charity. In this connection I will mention a conversation that occurred between several gentlemen upon the Orphan bill. It was said that Mr. Stow was appealed to during the session of the Constitutional Convention of 1879 to use his influence in securing the insertion of a section that would prevent the giving of aid to orphans, and it was urged that such a clause would secure the defeat of the New Constitution.

Mr. Stow's reply was emphatic. He said: "The document may be adopted (he was opposed to the New Constitution) and capital may go to — before I will consent to a scheme that may injure the helpless little ones."

I was considerably interested in discovering in this absorbed man of affairs strong affection for animals, and it seems that he has a horse which he loves as a personal friend. I confess to the reader that the discovery of these traits in a man who is the target of so much lip shooting greatly interested me, and I pushed on, seeking further discoveries in the same line. Having an intense passion for forests, lakes, canyons and mountains, I touched upon these subjects, anxious to know whether this controller of men possessed any of the instincts of the woodsman. To my surprise I found him a warm and enthusiastic lover of the sublime of Nature. His being is saturated with the love of rural life, streams and mountains. Facts like these are important in the study of human character because they indirectly show that the man who possesses these traits feels a conscious kinship with humanity. No hard-souled man ever indulges in these tastes. The introduction of a few sportive incidents in conversation revealed the fact that Mr. Stow is a very mirthful man. His sense of the ludicrous is keen, and he delights in quiet humor. A good story, a stroke of wit, a gleam of fun, cover him with ripples of merriment. I dwell upon these traits, because they are necessary in the study of the character of a man who has been, and is, second to no other on the Pacific Coast as a director of events.

In my third or fourth conversation I felt that Mr. Stow was pre-eminently magnetic and this impression was deepened by each subsequent interview. Though a comparative stranger, I felt mysteriously and strongly drawn towards the man by invisible hooks. I saw that he was able to inspire men with absolute confidence in himself. Without knowing anything about the fact, I plainly saw that Mr. Stow must have devoted, loving, personal friends.

From what I have already said, my readers will see that Mr. Stow has high social qualities, but whether he uses them or not to any great extent, I am unable to say. I speak only of the indelible impressions made upon the retina of my mind in the course of conversations. During these interviews Mr. Stow's brow was frequently, and for an instant, clouded with tokens of deep anxiety. I discovered in due time that this overcast

was automatic and reminiscent—the result of habit. But the fact, nevertheless, convinced me that his temperament was liable to nervous apprehension, and I felt that there was a history behind this phenomenon. To satisfy my mind I led the conversation into the field of political conflicts, and fortunately obtained some data upon which to form an opinion. Mr. Stow has great nerve power, and is extremely cautious. In conducting a campaign he wears his nerve force, and wraps his caution about everything. To prevent pain to his sensibilities by defeat, he anticipates all possible evil results. He prepares himself for the worst at the very start. He then sets himself to work against all conceivable odds. He stimulates himself by a view of possible defeat, and not by sanguine hopes of success. This method enables him to summon and use all his energies, but it also necessarily clouds him with deep anxiety. Nervous apprehension must be almost habitual with such a man. He gains nothing in the way of comfort by this method, but obtains a degree of pertinacity in the pursuit of an object that is phenomenal. Such a man can do his best where other men fail. He can outdo himself when his cause is seemingly hopeless. He can fight under the highest strain until the last moment, even in the face of certain defeat. And if I am not mistaken, he never believes in success until it is fully harvested. I do not know what Mr. Stow may think of this explanation, but I am confident that I read him aright. If so, he must necessarily, during the strain of prolonged effort, often rise into sublime impatience with incompetent agencies. And the momentum of the man must be terrible, and fearfully continuous.

He is fortunate, in view of these considerations, in the possession of tremendous physical power. An allusion to one of his political opponents brought out another peculiar and strong trait. He admires a strong, open, fair, vigorous, persistent adversary. I might mention a single case eminently illustrative of this trait. In the instance referred to, his admiration bordered upon personal affection, and yet a day never passed for years that the one did not give the other ponderous blows. If I should mention the name of the opponent referred to, all California would be amazed, and the student of historical character would be delighted. A trait of this kind, prominently developed, allies a man closely to the chivalric temperament, disarms enmity, and inspires admiration. But as I am not seeking to produce any of these results, I will leave the point with the reader without further explanation. In referring to old and bitter fights I discovered another interesting trait. He conducts a political contest with relentless vigor, and when concluded he banishes all differences and restores relations of amity. And here we find one secret that explains, to a great extent, Mr. Stow's long continuance in political life. He accumulates as small a store of animosities as is possible. There was disclosed another characteristic more positive than any yet mentioned. Mr. Stow is a man of great personal pride, or to put the matter in a different form, and one justified by the philosophers, he has a profound respect for himself. It does not occur to me now that he is "proud," in the vulgar sense of that term, and I have yet to hear or see anything in him that savors of boastfulness. In all our conversations he did not utter a single "brag." But he evidently honors himself, and he never forgives a man who questions his probity of character. The man who tramples upon his sense of personal dignity or self-respect closes once and forever all personal intercourse. Thenceforward Mr. Stow is that man's open and pronounced enemy, and I venture the assertion that there is not, in all this world, money or influence enough to assuage his hot indignation. The persistency that holds him immovably to any given line of conduct keeps him steadfast in this resentment of all assaults upon his personal character. I do not think that he parades this trait, or that he willingly discloses these animosities; but they exist, nevertheless, or I am a poor reader of character.

There are no negations in Mr. Stow. He is a bundle of positive traits, and everything in him is strong, aggressive and pronounced. And yet he is a very quiet man, with considerable reposefulness in his make-up. It follows, then, that he is a man of superb self-control. Louis XIV said to his grandson, "If you would have your will habitually respected you must show that you yourself are a slave to it." I imagine that Mr. Stow never needed that advice; he acts naturally upon that principle. If I have drawn the outlines of an extraordinary character I must be excused upon the ground that I am analyzing an extraordinary man—one admitted to be such throughout California, and wherever he is known.

Mr. Stow is a remarkable observer. This characteristic was illustrated in his account of the climate, vegetation and early history of Southern California. He went to the bottom of these subjects in a manner simple and thoroughly unconscious, and he gave me what I had failed to get elsewhere. He is intense in his mental application, and fearfully thorough. In this conversation he re-built the Mission life of early California, its customs, arts, etc., in fifteen minutes. His analytical power, his mentioned faculty for generalization, and his mental generalship, appear spontaneously and obviously in every talk upon important subjects.

The leading trait of his mentality is found in his habit of philosophizing. He strikes at causes, motives, methods, and the universal "Why?" He reasons closely, though somewhat abruptly, and puts his processes before you with unexpected suddenness. He is evidently an accomplished lawyer, and handles principles with exactness and skill. Mr. Stow would be called a thinker among any class of students.

I must now approach the problem that has so often puzzled my mind. Mr. Stow is a rich man, is worth half a million, and he possesses the tastes that enable a man to enjoy wealth. He has a farm that is spoken of by traveled men as the best cultivated in the United States. He lives in a city mansion that is thoroughly delightful. Why, then, does he engage in occupations that consume his vitality and deprive him of repose? I cannot answer this question by saying that he works for money, because I saw, or thought I saw in him indifference to money. Is it reasonable to suppose that a millionaire who shows no signs of greed will voluntarily subject himself to reproach and severe toil, merely for the sake of money? I think not. He is certainly not an office-seeker, and I am convinced that he would not accept official position under any circumstances. Neither is he an aspirant for fame. If he were, he would make some parade of his wonderful achievements but so far as I could learn he is absolutely and doggedly silent about his own deeds. We must look deeper for a solution of this problem, and I must proceed upon a line of thought somewhat in consonance with my own experience, study and observation. I cannot proceed in any other way, and think at all. I know—and all his being certifies to the fact—that vigorous natures, heavily charged with vitality, must act. Such natures cannot withdraw from the conflicts of life—they must do something. Such natures, if they can do no better, will rush to the mountains to witness the might and majesty of great storms—they will go anywhere to behold grand action. In England men of leisure, possessed of such natures, engage in the chase, indulge in gambling, or take part in war. In America there is no refuge for such natures except in politics. Thurlow Weed and Dean Richmond of New York, Frank Bird of Massachusetts, Long John Wentworth of Illinois, and many other stirring men of the same class, engaged in political strife because they luxuriated in the mental generalship that controls and directs the political destinies of a country. Such men are usually indifferent to office, fame and money—they rejoice merely in the exercise of power. And in all ages, men of the same structure have revelled in the fascination derived from conscious

power. W. W. Stow belongs to the same class. He is the admitted equal of the ablest of our silent American political diplomats.

Here, then, we have a solution of the vexed problem, and one that explains the reason of Mr. Stow's continuance in political life. For years he has been the leading force of the Republican party of California, and I have no doubt that he has enjoyed the luxury that is derived from such a life. And if my readers will recall my analysis of his character, they will see that my theory is based upon philosophical principles.

The special work of W. W. Stow for several years past is generally well understood. He is the political adviser of the Central Pacific Railroad Company, a position that gives him special opportunity for the exercise of his peculiar abilities. The company claims that it is frequently and unjustly assaulted by threats of hostile legislation, and that these assaults are often dictated by envy and malignity, and a desire to blackmail the corporation treasury. It asserts, also, that its just rights are often endangered by inconsiderate and immature policies based upon misdirected popular clamor. I beg my readers to understand that I am not discussing the correctness of these hypotheses. Just now I am in no way concerned about the question of regulation. I am merely studying a man known to everybody. I am endeavoring to comprehend W. W. Stow, and the reasons for his existence and his occupation. I am pursuing this investigation through the only avenues open to a man of my experience, and I am applying principles derived from a knowledge of human nature and human history.

The Railroad Company complains that it is compelled to employ agencies that will secure it against hostile and oppressive legislation, and procure remedial legislation when needed. Mr. Stow is charged with the duty just indicated. Accepting these postulates as correct, for the sake of argument we may believe that we understand Mr. Stow's position as he probably understands it. I am particular about this point because we never can understand a man until we put ourselves in his place and view matters in some degree from his own standpoint. Granting that I have made some progress in this effort, we have now before us an explanation of the reason why a millionaire engages in exhaustive political contests.

One other problem remains: It is admitted universally that Mr. Stow wields a tremendous power in general politics, and in the matters committed to his charge as the political adviser of the Central Pacific Railroad Company. What I want to get at is the probable secret of his great power in controlling men and events. I shall discuss this point as far as possible, in a philosophical spirit, and in the light of history as I have read it. I shall tabulate my explanations in a brief:

1. Much of Mr. Stow's success in controlling events and influencing men, is to be attributed to his character as already described. Such a character cannot fail to be eminently influential. He would be powerful under any circumstances, even without special experience or positive outside reinforcement. The momentum of his character alone would impart great vitality to any cause.

2. He is able to diagnose occult causes, and to discriminate between real and apparent forces. He forecasts events in their nascent condition. He knows or feels that certain conditions will sooner or later develop certain well defined policies. Hence, he is enabled to prepare his plans at an early day, and long before his adversaries comprehend the situation. He therefore deals with the very inception of events, when natural forces are pliable.

3. He has an intuitional knowledge of men and is able to discover in advance the men who will be influential. He is, therefore, able to make friendly alliances with the strongest men, and to instruct them in the principles that he proposes to advocate.

The mere politician allies himself to the man who is prominent for the time being, but Mr. Stow looks to the men who really control.

4. He instinctively discerns, with true generalship, the special aptitudes of individuals, and he knows exactly what each can and cannot do. He therefore gathers about him from all parts of the State the most efficient men, and thus wisely marshals, drills and combines his forces. He is also familiar with the names, persons, and characters of all the rising men of the commonwealth.

5. He knows the exact strength of his own forces, and that of his opponent.

6. He is conciliatory in his relations with men, and never antagonizes, nor foment discord for any purpose. When possible, he places men under obligation to him by kind words and timely encouragement; and, when he can do so, he furthers their ambition. In this way he links his own plans with the hopes of others. He has many ways of creating cordial relations with men. He accepts the advice of the humblest, and never despises any man. He is scrupulously polite to his subordinates, and requests the performance of duty as a personal favor to himself. He gives to his co-workers the credit that belongs to himself. He originates plans and allows other men to think that they are their own. He thus seems to follow when he is really leading. In this way he wins alacrity. He reserves to himself simply the quiet enjoyment of work.

This leader makes his combinations in advance of all other leaders, and at a time when other men are waiting for events. Most men collapse after a victory or a defeat, and do not soon renew their efforts; but Mr. Stow makes his combinations while others are asleep. He is aggressive, intrepid, has faith in himself and in men, and he pushes on through day and night, calm and storm. There is no enterprise that daunts him, and he dares to undertake seeming impossibilities.

In the following amusing recital, from Grey's "Pioneer Times," a rare old book of reminiscence, the "S" referred to is no other than our friend, Mr. Stow:

After the organization of the State under the first Constitution, a lawyer by the name of Pur Lee, was appointed County Judge of Santa Cruz county, and a man by the name of Peter Tracy was elected County Clerk. The Judge was an American, and the Clerk was Irish by birth. When sober they were both refined gentlemen in appearance and manners, but, unfortunately, they were equally opposed to long spells of sobriety, which was often the cause of the most ridiculous scenes in the Judge's Court.

Soon after Pur Lee went on the bench in Santa Cruz, there came to the county, to try his luck in the practice of the law, a Mr. S., a finely educated young lawyer, who is now well known among us as one of our most wealthy citizens. He was of fine appearance and pleasing manners, so he was not long left briefless. The very first case given in his charge was an important one, and involved a considerable amount. It was to be tried before Judge Pur Lee. S. prepared it with great care, and as it was a jury case, he thought over the speech he was to make on the occasion. In fact, he rehearsed it in a lonesome spot on the seashore, like the orator of old, where, amid the sullen thunder of the dashing wild waves of the Pacific, he gave his voice full vent. The trial day came; the case was an interesting one, and the court room was well filled with spectators. The evidence was all taken, and looked favorable to our friend S's side. He arose to sum up; and after reviewing the testimony, dashed right into his seaside speech.

All now appeared to be in wild excitement in the court room, to his imagination. His memory did not fail him, and he had just entered on the Fourth of July part of his speech, which he considered most beautiful, and was away up among the stars in the azure firmament, when, to his consternation, the Judge interrupted him with:

"Mr. S., I have an authority here which I would like to consult before we proceed further, as to that last statement you made to the jury."

S. is almost thrown into despair at this unexpected blow from his honor, the Judge, but, wiping the perspiration from his forehead, he stammers out:

"Well, your honor, what is the authority you wish to look at?"

The Judge quietly looks down from his bench upon Tracy, the Clerk, who was seated at his desk, before him, saying in the coolest way:

"Peter, hand out that authority."

Peter, equally unmoved, without answering, drew from under his desk a well filled demijohn, three or four glasses and a pitcher of water, placing them all on the bench before the Judge. The Judge, then, while deliberately helping himself to a well filled glass, says:

"Come, Mr. S., I know you must be dry, and you have over-excited that jury, so they had better come too. And Mr. Crane, your opponent, had better come also; for I see plainly that he has lost this case and needs a little consolation."

In astonishment, up walks S., in company with the jury, officials, lawyers and all, to enjoy the refreshment of the demijohn.

After a second round of drinks the Judge exclaimed, addressing the jury:

"I believe, boys, you are going to give this case to S."

To this the jury all assented; so the Judge, turning to George Crane, continued:

"That being the case, George, there is no use in pressing the matter further; it would only be a loss of time, and, besides, I see it is dinner hour."

Then, turning to S., he said:

"You can just reserve the rest of that speech for your next case; I see you have it well committed, and are not likely to forget it. It will do for almost any occasion, you know, and I thought it a pity to let you throw it away on a case already won."

This created merriment at S's expense, which he quieted by taking Frank Alzina's hint. Frank was the Sheriff, and in social tastes was something of the same sort with the Judge and Clerk.

The hint he gave to S. was that as soon as they reached the hotel for dinner, a basket of champagne would be in order.

S's friends in Santa Cruz county, when telling this story, always add that S. did in fact utilize that broken-off speech afterwards, on the occasion of his being elected Speaker of the California House of Assembly, two years later.

Be this as it may, it is certain that to this day the usual way of asking a friend to drink in Santa Cruz is, "let us consult an authority."

CHAPTER XXX.

Selden S. Wright—A Vice-Chancellor in Mississippi—Probate and County Judge in San Francisco—Defeated for Supreme Judge—His Clever Critique on One of Starr King's Lectures—Incidental Allusions to the Great Orator and Divine—Some Notes of His Family.

Selden S. Wright is one who, whether at the bar or on the bench, has always been an exceptional favorite with the profession and the public—a quiet, genial character, yet a man of painstaking effort, always pursuing worthy ends and accomplishing good work. He was born in Virginia, on the 7th of March, 1822, and graduated at William and Mary College at the age of twenty. Going to Mississippi to practice law, he followed the profession there, at Lexington, from 1843 to 1851. He then removed to Yazoo City, and within a year was elected vice-chancellor of the middle district of that State. In 1855 he was re-elected, but in the same year resigned, and resumed law practice at Carrollton, and pursuing it until his removal to California, which was in 1859, he taking up his residence in San Francisco in January, 1860. In that city he practiced law until his election as Probate Judge in 1868. He served a full term of four years. In 1874 he was commissioned by Gov. Booth, who was of opposite politics, to fill a vacancy in the office of County Judge of San Francisco, and in 1875 he was elected to the same position for a full term of four years.

In 1871 Judge Wright was the Democratic candidate for Judge of the Supreme Court, for the long or full term, and was defeated by A. L. Rhodes, Republican. He resigned his place on the Probate bench when nominated for the higher office. It was before him, as Probate Judge, the celebrated Hawes will case was tried—stated in the chapter on Gen. Barnes. He has been associated in law practice at various times in San Francisco with D. P. Belknap, John F. Swift, George A. Nourse, and his own sons, Stuart S. and George T. Wright. He has been successful in his practice, and his residence is one of the most delightful in the metropolis, where he has raised a large family.

In early manhood Judge Wright contributed largely to the secular and religious press, in which connection it may be stated that he is an active member of the First Baptist church of San Francisco, having been baptized into that denomination in Mississippi at the age of twenty-one.

I have desired occasion to connect the commanding name of Thomas Starr King with my work, and Judge Wright has given the opportunity. Thomas Starr King was not a lawyer, but he enjoyed peculiarly the admiration of the bar, and is often associated with lawyers in the public

mind, especially with Baker—See Chapter I. The great man died at San Francisco in 1864, at the age of thirty-nine. His only son, Frederic R. King, is a lawyer in that city, and pressing into prominence as a member of the law firm of Fox, Kellogg & King. This son was born in San Francisco on April 4, 1862, was educated at the public schools of that city, and graduated from Harvard College with the class of 1884. He was married in 1885 to a daughter of S. B. Boswell, and has two children, both boys, the younger bearing his grandfather's name in full. Thomas Starr King's widow married Mr. William Norris, Secretary of the Spring Valley Water Company of San Francisco, in 1866. The only daughter of Mr. King is the wife of Hon. Horace Davis, President of the University of California. There is one child of this union, a boy, born in 1876.

I have said this much by way of introduction to a very pleasant critique by Judge Selden S. Wright upon one of Thomas Starr King's most noted lectures. The subject of the lecture was "Personal Power and its Voices." Judge Wright gave his observations at the time to the old *Daily Herald*, May 30, 1860. I now reproduce them:

When the lecturer announced his theme, and went to his work, there was that about him which gave assurance of a man. Those who had heard him knew what to expect, and those who had not, felt, before the first page of the manuscript was flitted over, that their thoughts were held captive by a master mind.

The theme was one calculated to call out the highest points of the speaker—"Personal Power and its Voices." He speaks with ease and grace; words with him are the signs of ideas, and none of them are wasted. Each one in its appropriate place is significant. His voice is clear and strong—silvery in its tone, rather than deep and melodious. He is almost entirely free from affectation; his articulation is very distinct; his language chaste; his style easy and flowing, as smooth as a mountain lake, and sparkling and bright as the rivulet which leaps to its embrace. Some droll humor and some keen wit are mingled in his discourse, with occasional flights into the sublime, when you are borne up as on eagle's wings, and with blood pressing at the heart, and suspended breath, you are relieved, when, with the eagle's swoop, you are brought down again.

Many and great were the truths, both new and old, brought out and illustrated for the benefit of the admiring and appreciative audience. A vast storehouse of food for thought and reflection was unlocked and distributed.

There would be material enough for a book. It may suffice to say that the lecturer proceeded to show that the voices of personal power are as numerous as the callings and occupations of man. That it utters itself not only in books, or essays, or speeches, or paintings, or sculpture, but in all the acts of life. That it is this personal power which painted on the imagination the steamship, battling with tempests on the stormy ocean, whilst the steamship itself is the voice or expression of that power, by which the world knows of its existence. That those who manifest the possession of this power by words written or spoken have received more than their due proportion of praise. That we are accustomed to award the meed of greatness to the impassioned orator who can embody the very spirit of justice, and hold it up for our contemplation, whilst the man in humble walks, who has the same exalted conception, and has expressed it in all the arts of his life, is the greater of the two.

Many and beautiful were the illustrations of this personal power and the voices which utter it. From the bright group we can only choose a few. Among them were the flash of Webster's eye, the tones of Henry's voice, the sweep of Clay's arm, the palor of Choate's face, the almost transfiguration of Booth when he repeated the Lord's Prayer, the light that beamed from Wordsworth's eye, and the pouring out by David upon the parched earth the water which had been offered to his more parched lips.

Truth, abstract truth, is nothing, argued Mr. King. It must be embodied in the man, and the man must be big enough to hold it, or he could never utter it with power. It must take hold of and develop the latent heat, and be illumined by its flashes before it can be effective. The sublimest truths read even from the word of God, or repeated in sermons, are but as lullabies to soothe an audience into sleep, unless embodied in the man and sent forth accordingly.

The sublime lesson is taught from the Bible and the pulpit that the world shall be saved, not from the fact that the Word was written, or that the Word was eloquent, or that the Word was made literature, but that "the Word was made flesh."

With these last words the lecture was finished. As a whole, it was a loud voice which attested the great power of the speaker. From some of the details of the conclusions and illustrations I could but dissent. One was the illustration taken from Scott's character of Jeanie Deans, and Shakespeare's Cordelia.

If, argued the lecturer, to draw such a character as Jeanie Deans manifested so much power, even more would that power be manifested by acting the life of Jeanie Deans.

This conclusion is incorrect, and would lead to absurdities. For instance, Dickens has displayed as much genius in drawing the character of the elder Mr. Weller as in any of his characters, except, perhaps, in the few lines he has given us of "Tom's all alone." The same process of reasoning would lead us to the conclusion that if we could find the embodiment of Mr. Weller, Senior, or the lowly Tom, we should have in each a greater man than the immortal Boz.

Mere words, argued Mr. King, are nothing. The truths which they express, to be effective, must be embodied in him who utters them. Whilst this is true, as a general rule, the lecturer furnished a remarkable instance proving that it is not true always. Coleridge and a nameless individual are made to meet in view of a mountain cataract. Coleridge fails to remember the word adequate to express the idea which fills his mind. The word comes from the lips of the unknown with power and effect. "This is majestic," says the nameless one. Coleridge, with his very soul touched, shakes him by the hand, filled with admiration. See what power is in a bare word! That which follows shows that it was pushed out by no surcharged thought. But in attempting to improve his hold upon Coleridge's admiration, he says: "Yes, it is the majesticest, prettiest thing," etc. Of course admiration vanishes, and disgust fills its place. Now, had the unknown been struck by lightning immediately after uttering his first sentence—and it is a pity for his reputation that he hadn't been—Coleridge would doubtless have placed his name in song along with the Ancient Mariner, and embalmed it with the oil of immortality, and Mr. Starr King would have said over the stricken corpse, "There dwelt personal power, and that word majestic was its voice." Oh, the weakness of mere words, according to Mr. King's theory; and yet, Oh, the strength of mere words according to Mr. King's illustration.

We think there is a stratum of thought connected with the subject which Mr. King has not yet explored, which is necessary to mix in with the soil whence he takes such a noble crop of ideas and truths.

It is that ability itself, especially in oratory, is dependent in no small degree upon

the channel through which it is manifested. This principle in view, would have prevented him from placing too low an estimate upon a sentiment quoted from Mr. Webster's great speech in reply to Col. Hayne. The seed must not fall on stony ground. If so, it matters not how sound the substance, or how vital the germ, or with how much force and abundance they may be scattered. The chaff would do as well.

Burke could not be as great in any other case as when addressing the Lords of Parliament, with the Indies as his client and the civilized world as his auditory. That which is worked off by the mind must be readily consumed, or it will clog the machinery. A cord must be wound around the hearts of his audience, as it is unwound from the orator's own soul. That this not only calls forth, but actually adds to the speaker's power, Mr. King must know by experience. It was the preparation of the ground, so to speak, which gave to him who uttered the word "majestic" such power over the heart of Coleridge. It was the same preparation, as well as the "latent heat" of Webster, which produced such an effect when he repeated the words: "There are Lexington, and Concord, and Bunker Hill, and there they will remain forever." The surroundings with which the sentiment was uttered contributed due share to the greatness of the utterance. Mr. King sees nothing in the above words to produce the effect described, and attributes that effect to the force with which they were spoken. This is doing injustice to Mr. Webster's artistic skill as an orator. Such is not the philosophy of the facts, when properly considered. The admixture of the ideal and real is strongly blended in our natures. It was on the coast of Africa, as well as I recollect, where the crew of an English ship found the handle of a pewter spoon, with the word "London" stamped upon it. Each hardy tar gathered around to behold it, and cheeks that neither tempests nor cannons could blanch were suffused with tears. Not that they had forgotten their country, nor any feature of its landscape, nor any face within its realm, yet the sight of the spoon-handle was a material substance, brightening their recollection—a nucleus around which clustered unwonted concentration, a host of thoughts too big for utterance: hence their tears.

It was the same principle of philosophy which gave to the words of Mr. Webster their power. Massachusetts had been sneered at. He was repelling the insult with manly scorn. "The world," said he, "knows her history, and knows it by heart. The past, at least is secure." This was grand, indeed. It was bringing the whole past history in review in a few words. But what is history, and what the past, but things gone by and treasured only in the mind? When, however, he pointed, as if in full view, to Lexington, and Concord, and Bunker hill, there was a body given, in which these grand ideals immediately clothed themselves, and Lexington, and Concord, and Bunker Hill—they spoke like "Caesar's wounds;" they riveted the mind to the very spots made classic by those very heroic deeds of the past, giving back to view the very blood of patriots of which their soil had so freely drunk. If Mr. Webster, before pointing to those historic spots, had stopped short at the close of the sentence, "the past at least is secure," any whisper from any quarter of the audience: "There are Lexington, and Concord, and Bunker Hill," must have produced a great effect. They were the very words to do it.

The ground was prepared. Indeed the difficulty would have been to so repeat them that they would not have produced such a great effect. When, however, they were under such surroundings, uttered by Webster with all the force of his greatness, we are well prepared to believe that the effect was as the lightning, and the thunder, and the crash, all combined. It is most natural that it should be so.

I cannot close without expressing the great pleasure with which I listened to the accomplished lecturer.

It is, indeed, refreshing to be led along, away out into the deep forest of thought, by a true pioneer in the wilderness—an explorer who has gone out before and blazed out the track, and marked the noted places, and gathered together the richest specimens of the wealth and beauty of the land. What though he may have selected a specimen or two which may not assay well when brought to the test. It makes but little difference—the few from the many will scarcely be missed.

CHAPTER XXXI.

Hon. John D. Works—A Lawyer's Son—Fighting in the Army at Seventeen—At the Bar in Indiana—Late Removal to California—Phenomenal Success in this State—On the Bench of the Superior and Supreme Courts—His Law Writings. Final Decision in the Great Sharon Divorce Case—A Man of Discriminating Thought—A Character to Admire and an Example to Imitate.

The very strong name which Judge Works bears etymologically furnishes a good index to his character and career. He came comparatively late to this golden shore, but the same assiduous and well directed effort has marked his life here as had distinguished his previous history; and, improving every hour, he has literally worked himself into mastery and pre-eminence. When we first saw him re-enforcing and adorning our highest tribunal of justice, to which he was called in 1888, we had only to look back to the year 1847 for his birth, and to 1883 for his advent among us.

Judge Works is a native of Indiana. His boyhood was passed on a farm and at a country common school. At the age of seventeen he enlisted in an Indiana regiment in the war of the rebellion, and had nearly two years' service in the field before the conflict ended. He took part in the battle of Nashville, and at the capture of Mobile. Returning to home and school, he turned his mind to the law at the age of twenty. Hon. A. C. Downey, his uncle, who was for six years a judge of the Indiana Supreme Court, and who is now Dean of the law school at De Pauw University in that State, was then forming a class of law students, and young Works became a member. The course of reading was thorough, and embraced the recitation of forty-two volumes, a quantity largely in excess of what would be enjoined in any western, if not in any eastern law school. He was admitted to the bar in 1868, and shortly joined his father, James A. Works, in practice. He was met at once by a large volume of business, his father being advanced in years and throwing the chief responsibility upon him. The young lawyer was from that time engaged in some of the most important cases. One of these was the case of Merritt vs. Humphreys, the contest of a will. The testator was a very wealthy farmer and during his life boasted to one of the old practitioners of the county that he had never paid out any money to lawyers. The lawyer remarked that every man had to contribute something to the support of the lawyers, and that if he paid nothing during his life, his estate would have to make it up after his death. The farmer died soon after, leaving a will disinheriting a part of his children. The result was a long and expensive litigation, out of which Mr. Works and

several other attorneys made good round fees. Thus the prediction of the lawyer was verified. Another important case, in which Mr. Works was interested for the defense, was the celebrated case of the State vs. Cincinnatus Bradley, for murder. Bradley was three times tried, at first being convicted of murder in the first degree and sentenced to the State prison for life. On appeal to the Supreme Court, he secured a reversal. The venue was then changed to another county. The accused was tried the second time, found guilty of manslaughter and sentenced to the State prison for ten years. The lower court granted him a new trial, on the ground that if guilty at all, he was guilty of murder and not of manslaughter. He was then tried the third time, when the verdict was manslaughter, and he was sentenced to the State prison for two years. No effort was made to set aside this verdict. He was sent to prison and died before his term expired.

There were a number of strange Sabbatical coincidences connected with this trial. The accused shot his man on Sunday; he was arrested and lodged in jail on Sunday; the jury on the first trial, returned the verdict on Sunday; the prisoner was taken to the State prison on Sunday; was returned from the prison, on reversal of his case, on Sunday; was removed to another county for trial on Sunday; and the verdicts in the two other trials were returned on Sunday. The case is a leading one in the Supreme Court of Indiana, on the subject of insanity, and as defining a reasonable doubt. There was associated with Mr. Works in this case, William O'Brien, one of the most celebrated criminal lawyers of Illinois, and Major J. W. Gordon, equally eminent as a criminal lawyer in Indiana.

Mr. Works was also for the prosecution in the murder case of the State vs. Lyons, where the defendant was charged with the murder of his uncle, in which case Senator D. W. Voorhees was one of the attorneys for the defense, and in a number of other murder cases of equal importance.

Mr. Works also had some public experience before removing to California, having served a term in the lower branch of the legislature, and as a member of the Judiciary Committee of that body.

It was in 1877 that Mr. Works began writing his "Indiana Practice and Pleading." The work is in three volumes. It grew out of the indefatigable author's own private digest. There were already two works of the kind in the hands of the Indiana bar, but this latest soon came to be accepted as indispensable. When the second volume appeared, Mr. L. O. Schroeder, of Vevay, Indiana, wrote to "The Law Counsellor," that "the work is all that the author's most ardent admirers and sanguine friends could expect or hope for. Mr. Schroeder continued, reflecting the general sentiment of the profession:

The prudent and successful lawyer rarely draws a pleading without having first consulted authorities. Here a veteran in practice has consulted the authorities,

prepared us a form and furnished a list of the cases examined. The authorities that will sustain the allegations of the pleadings will generally be found to warrant the introduction of the evidence to sustain them. Thus we not only have a reliable form before us, *but we also have a trial brief.*

In this volume the reader will find the rules of pleading, so well worked out in the former volumes, crystallized into practical and reliable forms. It contains the elements of the science and art of pleading *in the concrete*, and is the most practical volume of the most practical work on the subject of Practice and Pleading ever published for Indiana.

As already stated, Mr. Works removed to California in 1883. In April of that year he settled at San Diego. He was soon afterwards employed in a case that became celebrated, that of *Burton vs. McDonald, et al.*, involving the title to the Jamul Ranch, a large and valuable tract of land in San Diego county. He represented the widow, and heirs, and administrator, who claimed that the title, which run to the widow and children, was held in trust by them, and that the property was subject to administration and distribution to the heirs, as against Wallace Leach who claimed the property under sheriff's sale. The case was decided against the heirs by the court below on all of the material points, but, on appeal, the Supreme Court reversed the judgment on all points, the decision being as broadly in favor of Mr. Works' position, as the judgment of the court below had been the other way. The case went back to the Superior Court of San Diego county, but in the meantime Mr. Works had become Judge Works of that very court. The late Justice McKee was employed to take his place in the case. Upon a second trial, Judge Works, of course not sitting, the case was decided in conformity to the Supreme Court decision.

On October 1, 1886, Judge Works became judge of the Superior Court of his county by appointment made by Gov. R. W. Waterman, to serve out a part of a term. The bar of San Diego county had memorialized in favor of this selection. At the next general election Judge Works was chosen his own successor, the Democrats not placing any candidate in the field. At the end of a year thereafter he resigned because the practice of law offered him much larger compensation.

On the first of October, 1888, Gov. Waterman commissioned Judge Works a Justice of the Supreme Court of California to succeed, until the next election, Hon. E. W. McKinstry, who had resigned.

Judge Works had already been nominated for the Supreme bench, by acclamation, by the Republican State Convention—to fill out the term Justice McKinstry had relinquished. On November 6, 1888, he was elected to the place by the people, defeating Hon. J. F. Sullivan, the Democratic candidate, notwithstanding the fact that the latter received the astonishing majority of eight thousand in San Francisco, where he was known all his life, and where Judge Works was comparatively a stranger.

On the Supreme bench Judge Works has been exceptionally assiduous, having written more opinions than any of his high associates; and these, both in their argumentation and conclusions, have won the pronounced favor of the bar. He wrote the opinion in the celebrated case of *Sharon vs. Sharon*, in July, 1889, which especially showed him to be a man of discriminating thought. Pending his election, and while occupying his present seat on the Supreme bench, under a temporary tenure as stated, he paid no special or noticeable attention to his own candidacy but gave himself up wholly to the work of the office. After his election he notified his publishers that he could not complete an unfinished law book while on the bench—that the people of the State were entitled to his full services, and should have them so long as he held office. The unfinished work just referred to is a treatise on the "Principles of Pleading and Practice." The object of the work is to give, in a clear and practical form, the general principles of Pleading and Practice as they exist at the present day, as affected by the rules of pleading at common law and in equity, and the codes and statutes of the several States. It is neither a work on common law, equity nor code pleading and practice, but on the general principles as affected by them all; and is adapted to the use of students as well as practicing attorneys.

In May, 1887, at San Diego, Judge Works completed a small work, which has proved a great saving of labor to the profession, entitled "Removal of Causes from State Courts to Federal Courts." The Judge has a large family.

An article in the *Century Magazine* for January, 1889, written by Judge Works shortly after he went upon the Supreme bench, on a subject challenging the serious attention of lawyers and laymen, may appropriately close this chapter. It is re-produced here in full, as follows:

ABOUT "LAWYERS' MORALS"—THE RESPONSIBILITY OF LAYMEN.

This is a matter that is much more seriously considered by reputable members of the profession than is generally supposed. It is a question of grave importance, not only to lawyers, but to the public at large. The standard of a lawyer's morals so far as his professional duties are concerned, is, in part at least, established by legislation in most if not all of the States. In California, for example, the Code of Civil Procedure provides:

SECT. 282. It is the duty of an attorney and counselor:

1. To support the Constitution and laws of the United States and of this State;
2. To maintain the respect due to the courts of justice and judicial officers;
3. To counsel or maintain such actions, proceedings, or defenses only as appear to him legal or just, except the defense of a person charged with a public offense;
4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by any artifice or false statement of fact or law;
5. To maintain inviolate the confidence and, at every peril to himself, to preserve the secrets of his client;

6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged.

7. Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest;

8. Never to reject, for any consideration personal to himself, the cause of the defenseless or oppressed.

This section of the code fixes a standard of moral and legal duty which if lived up to in practice should place the profession above just reproach. It is simply the embodiment, in legal form, of what is the lawyers' code of morals without legislation.

In an article in *The Century*, (November, 1884), it is said that "it is apparently the popular opinion that lawyers' morals are of a different type from those of ordinary human beings."

A great deal of the trouble lies in the very fact that popular opinion, and not the opinion of the profession, rates the standard of lawyers' morals below what it should be and below what it really is. It is believed that not only popular opinion, but the conduct of the public in its treatment of the profession, has tended more than all other causes to reduce the standing of individual members below the standard recognized by the profession. No lawyer of any standing believes that the moral standard of his profession should be below that of any other, or of any business or calling in life. But popular opinion has apparently established a lower standard of morals; and is constantly tending to drag the profession down to that level. It is undoubtedly true that many lawyers fall below that recognized by the profession at large; but this may be said of any class of business men, and to a very great extent they are educated by public opinion, which looks more to a lawyer's success than to his professional honesty. It is not at all "presumptuous for laymen to judge their conduct;" but it should not be overlooked by the layman who treats of the ethical rules which should govern lawyers, that his standard of the morals of the profession may be far below that of the great majority of lawyers, and that he may be contributing his mite towards the debasement of its individual members, who would much rather elevate it still higher. Certainly no one will deny that it is wrong for a lawyer to accept and attempt to win a cause which as a matter of law should be decided against his client, if he has knowledge of all the facts.

The California code, it will be seen, expressly forbids this except in the defense of persons charged with crime; and so it is with the codes of other States. But it must be borne in mind that a lawyer, before trial, knows but one side of the case, while the layman who judges of his conduct has heard both sides. Not only so, but the client frequently misleads, and sometimes purposely deceives, his own attorney by concealing or actually misrepresenting the facts. No doubt an attorney would be justified in abandoning the case upon the discovery of the deception that has been practiced upon him; but almost invariably when the client has misstated the facts to his attorney, he will do the same to the court under oath, and it is an exceedingly delicate matter for the lawyer to assume that his client is committing perjury and that the other party is in the right. This he has no right to do. It is his plain duty to represent the case fairly to the Court, whose duty it is to determine which of the parties is right.

If, however, the lawyer knows his cause to be wrong, he violates his duty as an attorney, the law, and his oath by accepting a fee. He should unhesitatingly refuse to act further the moment he makes the discovery, if the knowledge comes to him after entering upon the case. But the distinction between legal and moral right should not be overlooked. The lawyer has a perfect right, and it is his duty, to interpose for his client any legal defense, although a layman might justly say that as a matter of moral

right the client has no defense. For example, a debt may be barred by the Statute of Limitations. The defendant who is sued is in a moral sense still liable, as the debt is unpaid; but the Statute of Limitations having run, he has a legal defense which his attorney is bound, as a matter of duty, to interpose for him. Many other cases arise in which technical rules of law conflict with popular notions of right and wrong; and because of this, lawyers are frequently censured unjustly.

Very few thoughtful men, whether lawyers or not, will at the present day contend that a lawyer violates any rules of professional ethics, or commits any wrong to society, by defending a criminal whom he knows to be guilty. To be tried and defended by counsel, in open court, is a constitutional right, expressly guaranteed to every person charged with a criminal offense. No one, whether his attorney or not, has a right to assume his guilt. The law presumes his innocence. If he is unable to employ an attorney, the Court must appoint one to conduct his defense. The attorney has no legal or moral right to refuse to defend him on the ground that he knows him to be guilty, whether he is employed by the defendant, or appointed by the Court to appear for him. This duty requires him to make the defense for him fairly and justly, in the interest of society as well as of the prisoner. If, believing the prisoner guilty, he expresses a different opinion to the Court or the jury, he is guilty of a gross violation of duty and of professional ethics. Indeed, it is regarded by right-minded lawyers as unprofessional for an attorney to advance his opinion or belief in any case, civil or criminal, whether he is right or not. It is his duty to present the testimony to the jury, with his views as to its weight and the credibility of the witness, together with a statement of the law as he understands it, so long as his views do not conflict with the law as given to the jury by the Court.

It should not be necessary to say that no rule of professional ethics could justify a lawyer in any attempt to deceive the Court or a jury, by falsehood or otherwise. This is expressly forbidden by law. Many laymen seem to act upon a different principle. They often employ an attorney because they believe that he will be able and willing to deceive, mislead, or in some way over-reach the Court, jury, and opposing counsel. One of the great misfortunes is, that, when the services of a lawyer are needed, the question is not usually asked, "Is he honest, can he be trusted?" but, "Is he smart, can he win my case?"

It is the observation of the profession that the question whether a lawyer is honest, and stands high in his profession in a moral point of view, has but little to do with his success in getting business from the great mass of litigants. It is a lamentable fact that many of the very best and most upright business men, so regarded, employ lawyers who have no regard for professional ethics or the plainest rules of honesty or integrity, solely because they believe such lawyers will gain their cases by means to which no honest attorney would ever resort. Such men are quick to condemn the profession, but they do not hesitate to employ an attorney, knowing him to be dishonest, and to wink at his practices, which they know to be unprofessional, so long as he is their attorney and his efforts result in success. It will thus be seen that there is less inducement for members of the legal profession to be honest, and greater temptation to be dishonest, than in almost any other business or calling in life. His employers fix for him a standard of morals which disgraces both the client and the attorney. He is too often employed solely because he is understood to be dishonest. The better classes of the profession erect a higher standard, and endeavor to keep its members up to that level. That many lawyers fall below it is largely due to the causes just stated. A great majority of the young men who enter the profession are poor. They are not only ambitious to obtain business, but it is an absolute necessity that they do so. For this reason they are not so

careful as they should be about the cases they take. They soon learn from experience that men who stand highest in society and business circles are not at all particular how they win their cases so they win them. Many of them naturally drop down to the level of their employers' standard of a lawyer's morality, and never rise above it. Others, who have a higher appreciation of their duties and obligations, rise to the level of the true standard of professional morality. It is a great misfortune that any of the profession should fall below this standard. There is no class of men who should be more worthy of trust and confidence. Their standard of morals should not be allowed to fall below that of any other profession or business. Men who employ them should aid in maintaining this standard. No doubt members of the profession might remedy the evil complained of, to some extent, by proceeding against lawyers who violate their duties. The means provided by law for disbarring attorneys are ample; but it is a delicate matter for a member of the bar of any town or city to prefer charges against a brother attorney. It is very rarely done, and when it is, the Courts are slow to use their powers of removal. Indeed, the Courts of this country are very largely responsible for the estimation in which the profession is now held.

In the article referred to above it is very justly urged that an attorney should be a gentleman in court as well as out. A lawyer is likely to forget this in his zeal, in the cross-examination of a witness, and in commenting in argument upon the testimony of the witnesses for the opposite party. The object of a cross-examination should always be to get at the truth, and not to intimidate or confuse the witness into a false or contradictory statement. In commenting upon the testimony of a witness the attorney should never descend to personalities, except in extreme cases where the dishonesty of the witness is apparent, and "the justice of the cause requires it." The attorney, being privileged to speak freely of any witness, should use the utmost care not to abuse so high a privilege.

The subject of a "lawyer's morals" and "legal ethics" is of great importance to the profession, and no lawyer having a proper regard for his honorable calling will stand in the way of any honest effort to elevate the standard of morals by which the profession should be governed. But he cannot be expected to overlook the fact that laymen, who look at the question from their standpoint, sometimes establish for him a standard of morals far below that recognized by law and by the profession; that too many laymen employ attorneys, and expect to profit by their services, solely because they believe the particular lawyer they employ is governed by that lower standard of morals and professional ethics.

This observation is not confined to "great corporations" and "monopolists." It is astonishing how many men, who are recognized as the most honorable in business affairs, appear to believe that a lawyer is justifiable in resorting to any kind of falsehood and trickery to gain their cases. Such men can do more to elevate the morals of the profession by employing none but such as they believe to be honest—of whom there are as many as in any other calling, with perhaps one exception—than can be done in any other way. So long as lawyers are employed because they are regarded as being dishonest, so long will the profession be subject to reproach because it has bad men in its ranks.

That persons outside of the profession begin to think seriously of assisting to rid it of such lawyers is a good indication, and their efforts should receive every encouragement.

CHAPTER XXXII.

Joseph D. Redding—A "Native Son of the Golden West"—Another Many-sided Mind—Attorney for the Great Railway Company at Twenty-three—Reference to some Important Cases—A Pleasing Versatility—Love of Art—A Conqueror at Billiards and Chess—Genius in Musical Composition—A Popular Song Writer—Sketch by Ella Sterling Cummins—Thoughts of Mr. Redding on the Theme of Music.

This chapter shall be exceptional, as containing the only extended notice thus far given to one born and reared within our State. He might well have been introduced earlier, for he was adorning the profession before the present work was taken in hand. I had occasion, in the chapter on General Barnes, to point to the picturesque in that gentleman's prosperous career. A like effect will strike the mind as another and younger "triumphant Sylla" comes.

A shrewd observer has remarked that "lawyers, especially practicing lawyers, are not remarkable for the breadth of their views, or a statesmanlike grasp of intellect, but rather for a keen perception of the weaknesses of human nature, and for an apprehension of the right use of words."

Rufus Choate, whose fidelity to the profession was exceptionally firm, declared that "a legal mind, fully content and satisfied with law, cannot be a mind of a very high order, for the law rests on arbitrary collections of decrees." And, again, that "a mind confined exclusively to law is narrow."

It was the weighty testimony of David Paul Brown that "a mere lawyer is, at most, but the moiety of a man—heartless and soulless; his exclusive devotion to a stern and unfeeling science blunts all the finer emotions of his nature, and he at length becomes, like Coke, the scourge of his own family, and the relentless and ferocious adversary of genius and generosity."

Mr. Redding, having won an enviable place in his profession, and holding an ample clientage, is yet not a *mere* lawyer. He was born at Sacramento, California, on the 13th of September, 1858, coming of an old Massachusetts family. His grandfather was United States consul at Yarmouth, Nova Scotia, where B. B. Redding, father of Joseph D., was born in 1824. B. B. Redding early developed a taste for natural history. He came to California from Yarmouth with a company of young men he had organized, and who served as crew of their own sailing vessel, and bringing a cargo of lumber. This was in May, 1850. B. B. Redding's career in this State was distinguished for industry and public spirit. He served in the legislature, was prominent in politics, for many years a leading journalist, Mayor of Sacra-

mento in 1856, and Secretary of State 1863-1867. From 1868 until his death in 1882 he was the land agent of the Central Pacific Railroad Company. He was a regent of the State University, President of the Board of Trustees of the San Francisco Academy of Sciences, and was the controlling spirit of the Board of State Fish Commissioners. He was devoted to science. He wrote, among other papers in that line, one on the climate of California, for the State Agricultural Society in 1877, and another on the foothills of the Sierra, read before the San Francisco Academy of Sciences, in January, 1879. His father survived him for several years, dying at a great age at Brighton, Sacramento County.

Joseph D. Redding, after attending the Sacramento public schools, entered, in 1871, the California Military Academy at Oakland, conducted by Rev. David McClure. He remained there for two years, and then went to the Urban Academy in San Francisco, and prepared for a collegiate course under Prof. Nathan W. Moore. This accomplished, he was admitted, in 1876, into the Scientific Department of Harvard University.

Mr. Redding was twenty-one years of age when he entered the law office of Hall McAllister in San Francisco, and finished his preparation for the bar, having given much previous attention to the study of law. In August of that year the State Supreme Court admitted him, after examination, to practice. He very soon gathered a good clientage, and has since been doing a steadily increasing business. At the age of twenty-three he became one of the attorneys for the Central Pacific and Southern Pacific Railroad Companies, for the land departments thereof. It will not tire to mention some of the more important cases in his practice.

The case of the Central Pacific Railroad Company vs. Mudd, is reported in the 59th Cal. 585. It was an important one as settling the law on the question of ejectment on executory contracts. It was tried in Colusa County where the judgment was for the defendant, but on appeal to the Supreme Court the judgment of the lower Court was reversed and the plaintiff, Mr. Redding's client, finally prevailed.

An interesting case is that of The Central Pacific Railroad Company vs. Shackelford, in 63d Cal. 261. It was an action of ejectment. The railroad company held a United States patent for the land, issued and dated March 17, 1875. On the 18th of March, 1875, Shackelford took possession of the land, and continued in possession, adversely to the company, for a period of more than six years, when the company sued him to recover the possession. Mr. Redding of course represented the company. He lost the case in the lower court, and took an ineffectual appeal, the Supreme Court holding that Shackelford had acquired a perfect title under the Statute of Limitations. The Code of Civil Procedure required the occupant to pay all taxes on the land, in order to acquire title, but this requirement was an amendment to

the code passed during the period of Shackelford's possession. He showed that he had paid all taxes levied after the passage of the amendment, and the Court held that that was sufficient. But Justice McKee, dissenting, took Mr. Redding's view, that the occupant must have performed the strict letter of the statute as amended, that is, pay all taxes for five years, before he could acquire title by limitation.

It is a question if the dissenting opinion of Justice McKee has not virtually become law, under later decisions.

Another interesting case was the *United States vs. Kagama*, alias *Pactah Billy*. An Indian had murdered another of his tribe near the confines of his reservation, and was himself chief of the tribe. The trial coming before the United States Circuit Court at San Francisco, Judge Lorenzo Sawyer appointed Mr. Redding to make the defense. The counsel demurred to the indictment on the ground that the United States had no authority to try Indians for offences committed among themselves upon Indian reservations. He obtained a division of opinion in the Circuit Court, and took the case to the United States Supreme Court, and argued it there with Solicitor Goode and Attorney-General A. H. Garland. The Supreme Court sent the case back for trial before Judge Sawyer, limiting the jurisdiction of the United States Court strictly to the confines of the reservation, it being admitted that the reservation was set apart by law and not by treaty. When the case went to trial Mr. Redding showed that the lines of the reservation never had been properly closed by a surveyor, and there was a reasonable doubt whether the offense was committed inside or outside the reservation. The jury acquitted the Indian without leaving their seats.

The "Nanon" case, or that of *Goldmark et al. vs. Kreling et al.*, is in the 11th Sawyer and 13th Sawyer; and the final decision is found in the 35th Federal Reporter, 661. This is the most important case on the question of the rights of authors that ever has been decided in the United States. Mr. Redding represented the plaintiffs. The suit was originally instituted in the Superior Court of San Francisco to enjoin the proprietors of the Tivoli Theatre, San Francisco, from producing the operetta of "Nanon." Two days afterwards it was transferred to the Circuit Court of the United States, where there was a thirty-three days' continuous battle. M. A. Wheaton, Cope & Boyd and H. H. Lowenthal were for the defendants. Mr. Redding finally obtained a temporary injunction and the case proceeded before the Master in Chancery. Depositions were taken all over Europe and the United States. The case was finally argued in the Circuit Court before Judges Field, Sawyer and Hoffman, and a decision in favor of the plaintiffs was rendered in September, 1888.

The *Southern Pacific Railroad Company vs. Dull*, is in 10th Sawyer, 506. This case involved the construction of the Act of Congress of March

3rd, 1871, granting lands to the Southern Pacific Railroad Company from Tehachapi by the way of Los Angeles to Fort Yuma, a bill in equity being filed to set aside a patent issued to a third party as against the railroad company. Judge Sawyer rendered a very elaborate decision, and his construction of grants *in praesenti* therein laid down has since been quoted in every case relating to the subject.

The Southern Pacific Railroad Company vs. Poole, in 12th Sawyer, 538, and Same vs. Davis, involved the right of the Southern Pacific Railroad Company to amalgamate and consolidate other corporations with itself, and by so doing to assume all of the franchises and benefits formerly enjoyed by the separate corporations. The Court sustained the view presented by Mr. Redding, and held that this amalgamation could take place without creating a new corporation.

Early in 1888 the Law Department of the Southern Pacific Railroad Company, through Mr. Creed Haymond, the chief counsel, took the several opinions of Mr. Samuel M. Wilson, Messrs. Garber, Thornton & Bishop, Messrs. McAlister & Bergin, and Mr. Redding, upon the construction to be given the Act of Congress of March 3d, 1887, entitled, "An Act to provide for the bringing of suits against the government of the United States." An important question to be determined was whether this Act enabled suit to be maintained against the United States for equitable claims and for those asking for relief other than monetary. Messrs. McAlister & Bergin and Messrs. Garber, Thornton & Bishop rendered opinions limiting the jurisdiction to claims for money.

But Mr. Redding took the broadest view, and was the first one to do so. The result was that all of the cases falling under this Act were placed in his hands, and they involve several million dollars' worth of land. Mr. Wilson rendered a very able and exhaustive opinion subsequently, taking the same position that Mr. Redding had done.

The case entitled Adams vs. Shilling, in which Mr. Redding represented the Promontory Stock Ranch Company, was tried in Utah Territory in 1886. Cattle men had been grazing indiscriminately over thousands of acres of land in that territory without paying any rent, and had been establishing their cabins and making headquarters on lands held by the Promontory Company. Mr. Redding maintained a suit of ejectment, and the defendants sold out their cattle and left the country.

Mr. Redding has in charge all of the cases arising out of the overlapping of the Atlantic and Pacific Railroad grant in Southern California. These involve possibly seven hundred and fifty thousand acres of land. He is also attorney for several insurance companies and mercantile houses, and also for most of the theatrical managers of the State, and those in New York who have connections with this Coast.

To turn away from matters strictly pertaining to the *lawyer*, it is to be prominently noted that Mr. Redding has succeeded to his father's predilection for pisciculture. For some years he has been president of the State Fish Commission, and is special agent of the United States Fish Commission for the Pacific Coast.

He is a central figure in circles of art. In 1886 he became President of the San Francisco Art Association. He is the first of chess-players in California, having held the championship for 1884-85. In 1884 he won three games from the world's champion in chess, Dr. Zuckertort. In aid of charity he has appeared on the theatrical stage on several occasions. In 1878 he won the cue at billiards in the tournament at Cambridge.

Mr. Redding possesses genius in the line of musical composition. Here he challenges special attention. But Miss Ella Sterling Cummins has already presented this side of his mind, in a way pleasing to the musical world he moves in so much, and I ask her to let me copy here her very entertaining contribution to *The San Franciscan* of May 8, 1886. Before doing so, I have only to add to what has been already said, that Mr. Redding has been for a long while President of the Handel and Haydn Society of San Francisco, that he has written several comedies, is a man of family, and is possessed of a moderate fortune.

It will be seen that Miss Cummins, whose article now follows, succeeded in drawing from Mr. Redding some delightful thoughts upon a delightful theme :

Although a lawyer ambitious to excel in his profession, Mr. Redding dallies with the arts in a serious fashion, having a special gift in the line of popular musical composition that brings him the highest royalty of any of our composers.

An interesting study might be made of him as representing a peculiar type. Indeed, it is something of a novelty to see a young man with success perched on his banner, who has never known the seamy side of life, who has never battled with want or despair, who has never felt the pangs of hunger; for he has been fed with a golden spoon, given every advantage of education, and his share of the pleasures of life. It is seldom that the creative instinct survives luxury or develops its creative powers under such a comfortable course of existence; but in spite of it all Mr. Redding is a bright example of the native Californian who must needs give some evidence of the inherited gold fever in his veins. He belongs to the class born of that stirring time when staid people left their eastern homes and became adventurous gold hunters, his father, B. B. Redding, having made a strong impress upon that early history by his scientific research, and his mother being specially gifted in music.

Mr. Redding is the youngest of three brothers. He accompanied Hugo Mansfeldt, at the age of thirteen, on a concert tour to Marysville, where the local paper dubbed him "a phenomenon." A year later he was familiar with the compositions of Beethoven, Mozart, and Chopin; and then, like a true son of California, he began to dare to have ideas of his own, jotting them down in a crude fashion till he went to Harvard. Here, in addition to his law course, he studied harmony and counterpoint with Payne, his musical talents winning for him the position of director of the college

orchestra. Afterward he continued the study of harmony with Lejeal, of this city, composing many beautiful melodies that appeared close upon each other, winning an immediate popularity.

The following of his musical compositions have been published or performed in public: "Cascade Waltz," 1871; performed in concerts, Sacramento; "When Twilight Dews," 1875; published in San Francisco by M. Gray; "Ave Maria," sung in Catholic church, San Francisco, 1875; "Religious Quartet," do; "Song to the Class of '80," 1876; published in Boston; "Poco's Daughter," song, 1877; published in Students' Songs; "Beautiful Ballad of Waska Wee," 1877; published in Students' Songs; "Atheneum Waltzes," 1877; performed in concerts, Cambridge, Massachusetts; "Bric-a-Brac Waltzes," 1879; published in San Francisco by M. Gray. It has run through ten editions; "Little Mountain Maid," ballad, 1880, published by M. Gray, San Francisco; "Waltzes del Monte," 1880; published by M. Gray, also New York. Over ten thousand copies sold. "A Vision on My Heart," comic song; published in Boston, 1880; "Peter Piper Duet," or "Ah! Mio Oswego," 1882. Manuscript stolen and sung in the opera Madame Piper, New York, 1883-4; published same year by Pond & Co., since which time it has been sung all over the country. "Twelfth Night March," 1883; published in San Francisco by M. Gray; "Thou art Mine Own Love," duet, written for Emily Melville and Olonzo Hatch; sung in the opera of Fillee Taylor, California theater, 1883; afterward sung by Lillian Russell and Campbell, in Gilbert & Sullivan's opera The Sorcerer, New York; afterward sung by Ida Mülle and Daisy Murdock, in Offenbach's opera, Orpheus and Eurydice; published in 1884, by Pond & Co., New York; "Kisses Tell the Tale," song, 1884; published by M. Gray, and in the last number of the San Franciscan; "Serenade," in D minor, for violin; performed by Henry Heyman, concert, Platt's Hall, 1885; "March Triumphante," 1885; performed by orchestra of fifty-six pieces, at Sacramento, on the occasion of the flower festival in 1885, Mr. Redding conducting; "Religious Quartet," 1885, sung by the quartet of the First Congregational church; "Suite for Orchestra," (a) danse pastorale, (b) minuet, (c) valse, performed at the various theatres in San Francisco, 1885. Minuet was danced and played in Allan Dare, California theatre, November, 1885; "Barcarole, Santa Barbara," 1885; performed by California theatre orchestra; "In Olden Time a King, ha! ha!" bacchanalian chorus, 1886; sung at the dinner to Salvini, Bohemian Club; "Row on, My Love," contralto solo, 1886, in press.

Beside the above list of compositions by Mr. Redding, he has a large number of others which have never been given to the public in any form, but which have been composed and placed away, from time to time, in anticipation that an opera might be completed in which they would have place.

The creative instinct is the marvel of the human mind—a mental bird-of-paradise, that, according to the legend, is without feet, in order that it may never alight. It is bewitching and evanescent, a flash from another sphere, and yet there are those who deny its right to be, unless caught, tamed, bound, and held in an iron grip. Whatever realm it passes over, these new forms, new combinations, new thoughts, new melodies, spring up to delight the heart of man; yet there are those who refuse to admit its power unless it is the slave of technique. In literature the same rule prevails. First, one must have something to say; secondly, one must know how to say it; and who shall say that the former is not the greater of the two? "How to say it" may be the caprice of the hour, but "What is said" is the fashion of forever. So with music, the technique appeals to the mathematical mind, the flowing melody to the heart of man.

Mr. Redding is not a classicist; nay, he is merely a popular song writer. As a recreation from his business life, he sets his musical moods to words, and they are all fresh

and divine with this touch of creative skill, and within the comprehension of common humanity. He may fall far short of perfection in his methods, and doubtless does, but what he has to tell, however small and simple the story, is all fresh and new, and finds its way to the popular heart.

By some, popular music is considered of a low order. Consequently Mr. Redding is placed upon the defensive for daring to indulge in this luxury of setting his words to music, which he expresses in a characteristic fashion.

Mr. Redding says: "I consider that music is appreciated as a perfume is—by the senses, primarily. Melody is the form of music naturally most delightful to the human ear. It does not require abstruse knowledge to enjoy one of Rossini's operas; even his masterpiece, *William Tell*—which he wrote years after his other operas, for the purpose of convincing the severe classicists that he was familiar with all the rules of dramatic writing in heaviest forms—is pervaded by a beautiful, simple, melodic coloring. Wagner and the severe German school exalted music to its highest intellectual sense, and yet that which has made Wagner known to the masses, and appreciated by all is where he drops into what his followers call the follies of his youth; for instance, 'The Wedding March,' from *Lohengrin*, 'The Swan's Song,' 'Pilgrim's Chorus,' from *Tannhauser*. These appeal to every one by the simple beauty of the melody, and stamp him as a great composer, independent of whether the music contains an oboe effect or the blaring of sixteen hours.

"It is so hard to find an original composer of melodies; they rise so seldom in a generation that it became necessary for this enormous crop of musicians that has been hatched out in Europe in the last generation to create a new school of composition. So they started in by declaring that melody should be considered at a discount—as utterly beneath notice. Taking this as a creed, all that was necessary to render them great composers was to make their compositions as intricate and abstruse as possible. If their music was not understood, so much the worse for those who listened. This school reminds me of the sect of people during the time of Louis Quatorze, which Moliere portrayed in true colors in his play of *Les Précieuses Ridicules*. They were a clan of ladies and gentlemen who declared themselves the only representatives of culture, and all outside of their circle constituted a brood of uneducated people. They ceased to make their claim, however, when he had so successfully cartooned them that they were glad to hide from sight.

"That Wagner is a great composer, and worthy to be placed beside Beethoven, no one will deny; but of the crop that has sprung up under the shadow of his presence, all agree that their greatness rests solely on their excessive intricacy and involution. But, in spite of them all, the world will continue to believe that Bach is the father, Mozart the son, and Beethoven the holy ghost of music.

"I don't want to be misunderstood. I have as great a reverence for the sublimated forms of musical composition as any one, but I do not believe in worshiping them to the exclusion of melody. I don't believe in trying to drive the love of melody out of the masses. It can't be driven out! It is as natural to the human soul as the love of the perfume of the rose. Every one has an instinct to tell him what is pleasing in either music or flower, and the new prophet might as well say 'Attar of roses is a vulgar odor, my friend; that bed of violets is utterly scentless; a bouquet of tea-roses is a thing of the past—for I have here in a bottle a compound which will change all your mistaken ideas of perfume. It is a delicious compound of oak leaves, sawdust, and asafetida, and is so far above these other odors that when once you learn to like it you will never be satisfied with any thing else. It is your own fault, and because you have a very uneducated nose, if you do not already like it.'

"I hold the medium view—that music will develop itself in time by an assimilation of the two schools. Nevertheless, melody must be the dominant element and everything else secondary. No one can deny that the quartet from *Rigoletto* is more beautiful to listen to than a Gregorian chant, and for the very good reason that the modern forms of music, like the modern tools of the workshop, were not to be had by any composer of the time of Gregory, Ambrose, or Palestrina. The classicists, with these tools at their command, build wonderful constructions. But the new prophet might as well say, 'Build up your grand edifices with every adornment, put all your skill in the construction—never mind the idea of comfort, that is not our object any longer,' as well as to claim that melody is not necessary to musical composition. The human desire for comfort and pleasure of the senses must enter into everything, even music.

"A musical composition may combine harmony, counterpoint, fugue, suspension, and all the forms of music, and yet contain no melody, being without the perfume which anybody may appreciate; may be an utter failure as far as enjoyment is concerned. I have heard them without a single error according to the musical grammar, and yet they were as flat as stale beer. Then, again, I have come across a melody incorrectly rhythmized, improperly constructed, and yet touched with the divine afflatus—the thing we all long for and desire, and without which we are unsatisfied. I know that the classicists do not allow me to exist with such heterodoxy as this, so I suppose I may consider myself as already dead. But, put to the proof, all I have to say is, that the majority of these composers will go down into utter oblivion, with their dull classical compositions buried with them, whereas if any one of them could produce a melody equal to 'Way Down upon the Suwanee River' he would need no other monument."

Mr. Redding turns from his musical frenzies to beat Dr. Zukertort, the champion chess-player, at his own game, to try a hand at politics, to devise new means of entertainment for the Bohemian Club, of which he is a prominent member, to belong to the Fish Commissioners, until worn out with trying to discover the whereabouts of his colleagues; and last, but not least, to enjoy the company of a lovely young wife and baby girl. He is said, by those less smiled upon by Dame Fortune, to have had more good times than any other man in California, and if he were not the least bit spoiled by all these good, good things he would scarcely be human.

CHAPTER XXXIII.

A. A. Moore of Oakland—A Glimpse of the Popular Bar Leader of Oakland—District Attorney of Alameda County—A Prosperous Career Cast in One Field—Some Notes of James F. Breen, Superior Judge of San Benito—A Survivor of the unfortunate "Donner Party."

Is it *not* "in mortals to command success?" Here is one who has had no trouble with fortune. His triumphs have been the triumphs of earnest effort, but he has won from the start. He has led the Oakland bar for some twenty years, and is in the meridian of a prosperous life. When we see him now, in moments of repose, in his luxurious home, upon an eminence looking out over the far-reaching bay of San Francisco, its teeming shores, its mossy islands, and its famed "gate," the picture parallels his position in his profession—a commanding one achieved by superior strength, and held inviolable through fruitful years.

Albert A. Moore was born on the 23d day of November, 1842, at Waterloo, Monroe County, Illinois. His father was William Whiteside Moore whose grandfather settled at Waterloo (then Belle Fontaine, in the State of Virginia) holding a commission as captain of militia, issued by Patrick Henry, Governor of Virginia. Some of the Moore family still live on the old homestead first established in 1778.

Mr. Moore's mother, whose family name was O'Melveny, was a sister of Hon. H. K. S. O'Melveny, of Los Angeles, one of the ablest men of the California bar, and who has adorned the bench of the Superior Court of his county. Mr. Moore came with his parents to California in 1853, and settled in Alameda county, where he has since resided. He was not yet in his "teens." After passing through the public schools he entered the University of the Pacific, at Santa Clara, where his education, so far as it was derived from schools, was finished. He then took up the study of law at San Leandro (the county seat of Alameda county at that period) and pursued it, under the direction of Hon. Noble Hamilton, County Judge, (and afterwards Superior Judge) until he was qualified for the practice. Upon his admission to the bar he commenced practice at once and soon made his influence felt in his county.

At twenty-eight years of age he was elected District Attorney. He held this office for two terms, and won great reputation as a prosecutor of criminals. It was indeed a post where his exceptional vigor of mind and skill in the elucidation and analysis of evidence, could be employed to best advantage. Other than this office he has held no public trust.

Since he came to the bar he has been connected with most of the important litigation in his county. And he has been often called to the courts of San Francisco. His brothers of the profession place him in the first rank. He is noted for the rapidity and power with which he makes his presentations, of either law or facts, to court or jury.

His personal figure is striking, in keeping with his energy and precision of statements. He is six feet in height and his strong physiognomy reflects his individuality and force of character.

Mr. Moore married in June, 1871, an accomplished lady of San Francisco, Miss Annie J. Hall, sister of Hon. Samuel P. Hall, another prominent lawyer, who has also filled the office of District Attorney of Alameda county with general acceptance, for several terms.

It is noteworthy that Mr. Moore has always, since coming to the State in early boyhood, lived in the same county, and has always practiced at the same bar. His field was well chosen and he has made the most of it.

Upon the second trial, in the Superior Court of Alameda county, of the Toomes will case, Mr. Moore conducted the case for the proponent of the will, and succeeded in establishing the validity of the document. This case had been once tried with the same result, but had been by the Supreme Court reversed for errors (54 Cal. 509). An estate of about a quarter of a million dollars was involved in this matter. Under the will the property was devised away from the relatives and legal heirs, and the contest was based on the usual grounds of fraud, undue influence, and mental incapacity of the testatrix. It was also contended that the will was forged.

Mr. Moore with whom the Hon. W. W. Foote was associated, represented the plaintiff in the case of *Nehrbas vs. the Central Pacific Railroad Company*, an action for damages for the killing by a railroad train, of the plaintiff's five children. This case attracted great attention in Alameda county, because of the calamitous effect of the accident, resulting as it did in destroying at one blow the entire family of the plaintiff and his wife. Judgment went for the plaintiff but the action was appealed to the Supreme Court by the railroad company when the judgment was affirmed in an opinion that is important as settling the proposition that in such cases damages are not limited to pecuniary injury. (62 Cal. 320.)

Mr. Moore assisted the prosecution upon the trial of Henry F. Prindle for the killing of Dr. Nathan L. Buck in Alameda county. This was a highly sensational case in which the plea was insanity. The insanity was claimed to have been caused by disclosures made by the wife of Prindle, of criminal intimacy between herself and the deceased Dr. Buck, her physician. This case excited wide-spread interest as well by reason of its character as because of the high position, professionally and socially, held by Dr. Buck. It was twice tried, resulting eventually in an acquittal, as is usual in

such cases, but it was conceded on all sides that the arguments of Mr. Moore in this case were models for strength of statement and eloquence of arraignment.

Mr. Moore is a great favorite among his acquaintances and especially among members of the bar, by reason of his genial social qualities. Like many men of his profession he is very fond of out-door sports, hunting, fishing, and the like, in which he indulges as often as a busy life will permit.

HON. JAMES F. BREEN, Superior Judge of San Benito county, who is so well entrenched in the affections of the bar and people of his section of the State, was born in Keokuk, Lee County, Iowa, in 1842. In 1846, long before California allured the gold hunter, his father, learning that Commodore Sloat had raised the American flag at Monterey, started for this then almost unknown land. He set out across the plains with his whole family, wife and seven children, soon finding himself in an increasing train of emigrants, which comprised forty families when Fort Laramie was reached. Thereafter the community was known as the "Donner Party," whose vicissitudes and sufferings make up the most pathetic chapter in the story of the early settlement of California. These adventurous spirits gave their distinctive name to the beautiful lake in the Sierra, near which their calamity overtook them, and their bitter experiences have been treated in one of the volumes of Bancroft's History of California, under the head of "The Donner Party," by C. F. McGlashan.

Soon after being relieved from their strait in the mountains, the elder Breen located with his family at the Mission of San Juan, then in Monterey, but now in San Benito county, where he resided until his death in 1868. His son, now engaging our notice, was educated in the public schools and at Santa Clara College, graduating from the latter institution in the year 1862. T. I. Bergin, John M. Burnett, and D. M. Delmas, of the San Francisco bar, and B. D. Murphy of San Jose, were among his fellows at the college named.

Upon leaving that place the young man commenced a course of law study in the office of E. R. Carpentier, in San Francisco. It was in 1863 he was admitted to practice in our Supreme Court. He went back in that year to Monterey County and followed the profession there until the year 1874.

The county of San Benito being then created out of a part of Monterey, his home at San Juan was within the new county. He had been elected to, and was exercising at the time, the office of County Judge of Monterey, but resigned the same, and was appointed by Gov. Newton Booth to the like office in San Benito. He had served two terms as District Attorney of Monterey County, taking the office first at the age of 24.

At the end of his term as County Judge of San Benito, Judge Breen declined an apparent certainty of re-election, and resumed the practice of law at Hollister, the county seat.

In the year 1877 he represented San Benito County in the lower branch of the legislature. At the election for members of the constitutional convention in 1878, his name was placed on the Workingmen's ticket for delegate from the State at large. He had declined to be a candidate, and was defeated with his ticket, but polled the largest vote on the losing side. At the first general election in the following year, under the new constitution, Judge Breen was elected, without opposition, Judge of the Superior Court of San Benito County, and has been continuously in the office since.

Judge Breen has always been a Republican in politics. In 1886 he was urged by many personal and political friends to permit his name to be placed before the State Convention of his party in connection with the office of Judge of the Supreme Court, but he declined the honor. He modestly declared that he had always been a member of what might be called the bucolic in contradistinction to the metropolitan bar, and that, as such, his professional life had been passed in the periphery of the practice. "You know," he said, "that in our profession, as in physics, one must look for the heavy matter near the hub."

But Judge Breen's thoughtful, judicial temperament, the study and balance to which his judgments testify, mark him as one qualified for exalted place on the bench while his personal qualities challenge universal esteem.

CHAPTER XXXIV.

*John Currey—A Chapter that is a Volume of History—A Character which Presents a Most Profitable and Entertaining Study—A Study and Intellectual Ancestry—Some Notable Family Names—At the Bar in New York—References to Distinguished Lawyers of that State—Coming to California with the Pioneers—Law Practice in the Early Days—Some Great Land Cases—Interesting Statement of the Old "Squatter" Land Sales—Judge Currey's Remarkable Memory—Still in Cross-Examination—The Memorable Case of *Waterman vs. Smith*—A Criticism of the Recent U. S. Supreme Court Opinion in *Dominguez vs. Betteflier*—Judge Currey on the State Supreme Bench—His Celebrated Decisions—The "Legal Tender" and "Specific Contract" Cases—His Important Part in Public Affairs—How Dr. Gwin Defeated Him for Judge Hoffman's Place—Sliding with Douglas in the Great Democratic Break-up—Stumping the State for Governor in 1860—A Tilt with Milton S. Latham—Houses Greasy in the Fight—An Anecdote by Ted Robinson—Late Connection with the Great Sharon Case—Still at Work in the Breeding of Life—Tributes by Hon. A. P. Coffin and R. G. Hopkins.*

They are many, indeed, who, looking at the volume in hand, point to this sturdy character as "the noblest Roman of them all." Decidedly impressed with the dignity of my present subject, I recognize that to consider it is to learn and profit, as well as to teach and entertain; and, indeed, a chapter is now to be written, which, not for its style or method, but for the intrinsic value of its story, must abide as a memorial of an able bar and an essential part of the history of a great State.

There is little danger of the pen running into adulation. It will find full engagement in simple statement. Still the charm of rhetoric is in the record, just as at times, (to quote South), "Matter of fact breaks out and blazes."

We are looking now at a wise man, one who can himself look through the annals of the State back to their first page and say, "All of which I saw and part of which I was." No other of our bar leaders has carried into a hale old age such extraordinary fecundity of mind. Few have had such grasp of memory. Nor has there been seen in any other stronger proofs of bodily vigor.

He has always been a serious man, dealing with weighty matters, laborious, and in a long life has done a vast amount of enduring work; but he was never a severe man. Judge Currey's gentleness of heart has been more and more marked as the years have flown. He is one of the most unpretentious of men. He treats life as a great responsibility, "Unhasting, unresting," he has, besides attaining leadership in his profession and high place on the bench, accumulated a considerable fortune.

A master in law, still in harness, while consulting his own convenience, in the evening of life, there has yet always dwelt a good deal of poetry in

his soul. He has the classic poets classified in his mind; especially from Milton he quotes with pleasing effect. He is a man with quiet tastes and bearing, but never sequesters himself. He is always approachable, not impulsive; he is not magnetic; his temperament is warm, but the intellect dominates. His peculiar gift, his strong side, is judgment; and while you can appeal to his heart, he always wants you to show judgment in your appeal; else, winning his pity you forfeit his respect. He is really a magnanimous man and a firm friend.

Outside of his family, Judge Currey's chief satisfaction is in the company of thoughtful men, in the interchange of ideas. He is a philosopher, but a delightful one, and has a vein of quiet humor that is unfailing. From what has been said of his memory and other attributes, it can be readily seen that there is continual charm in his conversation.

I first saw Judge Currey in the year 1858, in a political convention at Sacramento. The Democratic party was dividing on the question of slavery in the territories, as will be noticed hereafter, and the Judge was nominated by the Douglas wing of the party for Justice of the Supreme Court. Very fortunately, Hon. A. P. Catlin, of Sacramento (whose own career is outlined in Chap. X), was intimate with Judge Currey, in that city long before I knew him, and had, still further back, practiced at the same bar with him in New York. Mr. R. A. Robinson, of San Francisco, also had an intimate acquaintance with the Judge and his father's family, in the Empire State. These gentlemen have freely given me the benefit of their knowledge and recollections.

"Judge Currey," says Mr. Catlin, "before coming to California, had practiced in Westchester and Ulster Counties, in New York, at a bar which has produced some of the most eminent judges and lawyers of that State, and had already acquired a good standing as a lawyer and an excellent reputation as a man."

The American ancestors of Judge Currey were mostly of English, Scotch and Dutch origin. They were a sturdy and intellectual people, for the most part engaged in agricultural pursuits. Those in mercantile business lived in and about New York City, and those engaged in farming in and about Westchester county, New York. He is able to trace his American lineage back to his great, great grandparents, and in two instances, to two generations beyond, none however, to James'town or Plymouth Rock. His great grandfather, Richard Currey, the son of a Scotch immigrant, was born in Westchester county, in 1710, and lived the most of his life in Cortland town in that county, where he acquired a large landed estate. He died in 1806, in the ninety-seventh year of his age, respected and esteemed as a man of intellectual and moral force and of strict integrity. He left surviving him a large family, of whom three were sons. Stephen, the second son, was Judge

Currey's grandfather. In his early manhood, he was married to Frances, the daughter of Thomas Moore and Elizabeth Channing, his wife. Thomas Moore was a merchant, and the son of John Moore, an eminent merchant of New York City.

Judge Currey's great grandfather, Thomas Moore, was one of a family of eighteen children, and himself the father of a family of eleven children, of whom Frances was the second. Her brother, Thomas Lambert Moore, was the rector of the Protestant Episcopal church of Hempstead, Long Island. He was an earnest and evangelical christian minister. Her brother, Richard Channing Moore, was the rector of St. Stephen's church in New York City. He afterwards became the bishop of the diocese of Virginia, which office he exercised for the remainder of his life. One of the daughters of Thomas Moore became the wife of Israel Bedell of Staten Island. His son, the Rev. Gregory T. Bedell was a celebrated clergyman of the same church in Philadelphia, and his son, the Right Reverend Gregory T. Bedell is now the bishop of the diocese of Ohio. Thus it is seen that Judge Currey stands in immediate relation to the line of the priesthood of Apostolic succession. His grandparents, Stephen and Frances, lived to a good old age and left surviving them a large family. This grandmother was a woman of rare excellence, deeply religious, gentle and benevolent. Of their family, there were four sons, three of whom attained to great age—the first to the age of one hundred and one years; the second the age of eighty-nine years, and the third to the age of ninety years. Judge Currey's father, Thomas, the second son of Stephen, was born in Cortland town in 1773, and lived there all his life, during which he became one of the foremost farmers of the country. When about twenty-three years of age he was married to Rebecca, the daughter of Benjamin Ward, a farmer living in the same town. He died in 1862, aged eighty-nine years, and his wife died in 1864, in the eighty-eighth year of her age; her American ancestors extended back to her great grandparents, nearly all of whom resided in Westchester county. The Ward generation were mostly from England and Holland. They were a vigorous race of people, both intellectually and physically.

Judge Currey's father was a man distinguished for his sound judgment and powers of reasoning. Within his sphere of authority his will was the law. In his religious views he was not entirely orthodox, but was not so far astray as to place him under the ban of the church. He was exact and honest in all of his business transactions. Judge Currey's mother was a woman of the vigorous qualities of her family. Her most distinguishing mental talent was her memory. In disposition she was kind, affectionate, and benevolent. The poor and unfortunate were the objects of her christian, sympathetic care, and to such she rendered relief when she could. Her kind and christian nature endeared her to all. To these parents were born six

sons and three daughters, who grew up to mature life. They were all of sound physical constitution; in habits they were temperance people, observing well the laws of health; intellectually they were above the average and were so acknowledged to be. There were no disturbers of the peace among them; they were peaceful and law abiding. Being men of strong wills, they stood up manfully for the right as they understood the right to be. Some of these sons were strongly aggressive in their natures, giving no quarter to the evil and immoral practices of the communities in which they lived.

This was particularly the character of the oldest of the brothers, Benjamin, who was earnestly religious, and who for years waged a relentless war against the liquor traffic of the country where he resided. This he continued until victory completely crowned his efforts; he lived to the age of eighty-six years.

The most notable and distinguished of these brothers was the Rev. Daniel Currey, who had the advantages of a liberal education, which he improved throughout his life. For twelve years he was the editor of the *Christian Advocate*, the accredited organ of the Methodist Episcopal church in New York. He was a man of great mental capacity, a strong debater and an able and terse writer. He seemed to remember everything he ever read or heard. At the time of his death, in 1887, he was, and for some years had been, the editor of the *Methodist Quarterly Review*. He was of large stature and of strong physical constitution, but succumbed under his long life's labors in the 78th year of his age.

Within a few years past four of Judge Currey's brothers and one of his sisters have died; the average of their ages was eighty-two years, and now he and his twin brother are the only remaining members of his father's family.

I have given this brief history of Judge Currey's generation of men and women, in order that the natural qualities, intellectual and physical, of his race, may be understood, and that his own natural forces may be properly appreciated.

Judge Currey was born in the township of Cortland, Westchester county, New York, in October, 1814, and as he grew up his time was divided between the labors of his father's farm and the common school-house near by. At about the age of sixteen, he says he began to thirst in earnest for a good education; and after a while of impatient waiting he was allowed to attend the Peekskill Academy, in his native township, where his progress in his studies received the commendation of his teachers. After that for several years he spent considerable time at academies and at college, but he did not remain in college to graduate. In 1839, he entered the law office of the Hon. William Nelson, of Peekskill, as a student of the law, and after three years under the tutelage of Mr. Nelson he was examined and admitted

by the highest courts of the State to the degrees of attorney at law and solicitor in chancery; and after three years more engaged in practice as a lawyer, he became eligible and was admitted to the degrees of counselor at law and counselor in chancery.

Mr. Nelson was eminent in his profession, and assiduously devoted to it, and young men pursuing their legal studies under him were expected and required to diligently attend to their duties. In the course of his life Mr. Nelson served for some time as a State senator, and was a member of the Court of Errors. He served two terms as a Representative in Congress, where he became acquainted with Abraham Lincoln, and between them there ever afterwards existed a strong friendship. Some years ago there was published a correspondence between Mr. Lincoln and Mr. Nelson, from which it appeared that the former was seeking the position of Commissioner of the General Land Office, and the latter was using his influence to secure the place for Mr. Lincoln. Mr. Nelson was a particularly valuable member of the House of Representatives as a committee man, so said Secretary Seward. Mr. Nelson died in 1869, in the eighty-sixth year of his age, respected and honored by his acquaintances of a wide-spread circle.

In the latter part of 1842, Judge Currey and Edward Wells of the same law class formed a law partnership and commenced professional work at Peekskill. Their attention to business was diligent, and their success highly satisfactory. They continued together for nearly five years. Mr. Wells has remained there since then. He was a man of great educational acquirements, and has steadily added to his stock of learning during all the years of his manhood. He has kept up his classical studies, and is one of the best Greek and Latin scholars in all the country. His law learning covers the whole field of jurisprudence. For eloquence he had no equal in the district of country where he lived. The good people of all the country where he has long been known esteem him, not only for his great learning and ability, but also for his great moral worth, and his untiring labors in the temperance cause for nearly fifty years.

In 1847, Judge Currey was invited to a partnership by Theodoric R. Westbrook, of Kingston, New York, which he accepted. Kingston and the country of which it was the center offered larger inducements for legal business than did Peekskill and the country about that place at the time. Mr. Westbrook was a young lawyer of great reputation and was doing a prosperous business. While this new partnership continued their business was large and profitable. They dissolved in the summer of 1849, because Judge Currey at that time resolved upon a journey to California, to which the eyes of the world were then turned. He says that he has often wondered that he left so promising a field as Kingston then was for the uncertainties and hazards of the new El Dorado.

Mr. Westbrook was a Democrat of free-soil tendencies. He was a fine speaker and fond of the stump in times of national and State elections. Some years afterwards he served a term as a member of the House of Representatives. He was devoted to his profession and was a great success as a forensic debater. In the course of time he became a judge of the Supreme Court and after many years in the discharge of the duties of his office, he suddenly died while in attendance at a term of his Court in Troy, New York. He maintained at the bar a high and honorable reputation, and, as a Judge, was able and just.

In 1845 Judge Currey was married to a daughter of Ebenezer A. Scott, of Clinton county, New York. In the summer of 1849, he left New York and came via the Isthmus of Panama to San Francisco, where he landed on the 18th of August of that year. Among the passengers were Lieutenant Beale, Sherman Day, Doctor White of St. Louis, Frederick P. Tracy, Philip A. Roach, William Sherman, John B. Weller, James Phelan and many others, the most of whom have passed on to the silent shore from which there is no return. After spending some time in San Francisco, he went to the mines, where his stay was of brief duration, and after spending a month or more in Sacramento and the upper valley he returned with the chills and fever to San Francisco, and placed himself in charge of Dr. White, his fellow-passenger, and in time recovered so as to set about business. He opened an office in an old building standing where Montgomery Block in San Francisco is situated, and from that time he practiced law with fair success until he went to New York in the spring of 1851. After remaining in the State of New York about two months he returned with his wife and little son, nearly five years old, to California, by way of the Isthmus, and arrived at San Francisco on the 24th of June, two days after the great June fire of 1851, which, with the great fire of the preceding month of May, had rendered San Francisco a charred waste, more drear than when the place was a sandy heath. He found his office and its contents burned, and his business gone. He, with his wife and son, sought entertainment at the old Oriental Hotel, which was one of the buildings that had escaped the fires; this was a well-kept house, and full to its utmost capacity. The people of the town were engaged in re-building, but the prospect to a man engaged in the business of the lawyer was not encouraging, so he, with his family, repaired to Benicia, the county seat of Solano county. He had been brought up to the business of a country lawyer, and preferred it to a city practice. The country next north of the bays of San Francisco and San Pablo was then in the early stages of its development, and Benicia, though not in itself a place of great prospective business importance, was a convenient center for an extensive and profitable professional business. It was not long before Judge Currey was in the full tide of practice, which required his services at every

county seat of the 7th Judicial District. He remained in the country for ten years, and has often been heard to regret that he did not continue there all the years of his professional life. He claims that a country practice has advantages which are not to be found in large cities. In the country causes are tried without the annoyance of unreasonable delays; the danger of perjury is much less than in cities, and the men who constitute juries are more conscientious and reliable than the general class of jurors in cities; and beyond all these considerations country jurors understand the matters submitted to them better, as a general rule, than do the great majority of city jurors. Country jurors appreciate the responsibility of their positions, and their neighbors, who are generally informed of the nature of the controversies arising in their communities, hold them responsible, in their estimation, for the faithful and just discharge of their duties.

In 1860 Judge Currey and his wife, with their four children, visited their friends in the State of New York. While there, his youngest, a bright and promising boy of about five years of age, died. This was the first of his family bereavements, which he says is never brought to his mind without the pain of a lasting sorrow. In 1861 he removed to San Francisco, where a good share of his country business followed him.

In 1863 he was elected one of the Justices of the Supreme Court under the amended Constitution of the State, and entered upon his office on the first day of the following year.

After his retirement from the bench he formed a partnership with Oliver P. Evans, which continued for eight years, and until the first of January, 1878, when he retired from practice on account of impaired sight; and since then, though his vocation has been that of attorney and counsellor at law, he has been interested in the business of farming. In the spring of 1877 he suffered his second great affliction, in the loss of his estimable and accomplished wife, who had shared with him for more than thirty years the fortunes and vicissitudes of an eventful life. In December, 1885, his only daughter, esteemed and loved by all her friends and acquaintances, was suddenly snatched away, leaving remaining to him only his two sons.

Judge Currey and his wife attended well to the education of their children. The oldest of his sons was educated at Williams College, where he graduated in 1867, and then spent a year and a half in Europe, and after his return studied law at the Albany Law School. He then spent about a year and a half in his father's office, and was admitted to practice in all the courts of this State. The younger of his sons graduated at Yale College in 1873. For two years he was the president of his class, which was evidence of his good standing as a scholar, as well as that he was a gentleman in his deportment. He was not inclined to a professional life. He was soon afterwards appointed to a place in the United States Coast Survey, under the su-

perintendence of Prof. George Davidson, but resigned at the end of a year's service.

Aided by their father, these sons of Judge Currey became farmers in the northern part of Solano county, where each for several years has followed his chosen vocation with good success. Each is a farmer of about fifteen hundred acres of land. They, with their families, live in the enjoyment of an independence, and having the means necessary, they are able to indulge in their educational and æsthetic tastes, as well as to surround themselves with all things essential to comfort and happiness. While they are not rich, according to the standard of wealth at this age of the world, they are not poor. They may be said to be in the position of the man

Who feels not the wants that pinch the poor,
Nor plagues that haunt the rich man's door.

The relations always maintained between Judge Currey and his sons have been those of confidence and a free interchange of thought. He believed it to be the duty of a father, if it be in his power, to give his sons an early start in life.

Referring to the condition of things in San Francisco when he commenced business in that place in 1849, Judge Currey says it was chaotic in the extreme. The houses and business places were of the rudest fashion and construction. The streets were raw, and the sandhills were nearly everywhere in loose and shifting piles, and many were living among them in tents or rude temporary shanties, and the people were rushing about in every direction, and all seemed to have something to do; they were buoyant, cheerful and hopeful, and generally disposed to be law abiding. The legal profession kept apace with the growing business of the town. Hall McAllister had, by a fortunate event for himself, become prominent as a leader of the bar, which he well maintained throughout his life. There were many others who came to California about that time, and during the next year, who made their mark afterwards in the history of the bench and bar of the State; and there were others who glimmered and glittered for a season, and then passed out of sight, as dies out the fire of light combustibles. Judge Almond's Court of First Instance was an encouraging forum for this class of flashy and superficial lawyers, in which law learning was at a discount far below its value, as there was then no court in operation for the correction of the errors of the Court of First Instance. The Judge of this court did much as he pleased, and he was pleased with the rapid dispatch of business, from which he derived large fees, measured and taxed according to a cost bill devised and enacted as law by himself. To object to the payment of a bill of costs was to place the lawyer objecting under the censure and ban of the court, and therefore he acquiesced in and even applauded the Judge as an honest and just man, taking care at the same time that his

words of commendation should come to the ears of the Judge, who was not hard of hearing when the members of the bar joined in their pæans of praise.

At the time Judge Currey came to the bar, and during the period he was engaged in the practice of his profession in his native State, the common law and chancery systems of pleading and practice existed there. By the constitution of New York, adopted in 1846, the common law and chancery jurisdictions were consolidated, and the Code system of pleading and practice was soon after adopted by legislative enactment; but the changes effected by the Code did not render useless the learning of the common law and equity systems of pleading and practice; for under the administration of judges educated in the old school, supported by the lawyers of the time, the Code system of pleading and practice was subjected to the same tests of reason and principle, which were applied in the construction of pleadings before used in litigation in the courts of that State. Therefore it was necessary that the new forms of procedure should conform in substance as far as practicable, to the reasons and principles which governed the courts under the old systems.

Regarding the changes in the forms of pleading which were made by the Code of civil procedure as not destructive of the substance of things, Judge Currey continued throughout his professional career to consult the approved works of the old masters on pleading in the courts of law and equity; and in his researches relating to the law of a given subject he found the new and supposed improved nomenclature given to subjects and to actions, not in any degree more certain or convenient than the old.

His knowledge of the rules of pleading, as he learned the same under the common law and chancery systems, were of inestimable advantage to him practicing under the Code system of California, an advantage of which he was able to avail himself in complicated cases. This was well and successfully illustrated in the action of Blankman against Vallejo, tried in Alameda county. The suit was brought to recover a large sum of money, Judge Currey being for the plaintiff. It was most vigorously defended by William H. Patterson and Gen. Charles H. S. Williams. The difficulties in the plaintiff's way were regarded by many lawyers as insurmountable. The plaintiff, however, recovered, and the Supreme Court affirmed the judgment, (15th Cal.) In speaking of the result, Gen. Williams said the victory for the plaintiff was "a triumph of good pleading;" and no lawyer at the bar was more competent to appreciate the value of good pleading than was Gen. Williams.

Judge Currey's business, while living in the country was not confined to the seventh judicial district. It extended to Sacramento, San Francisco and other parts of the State, and comprehended in range the routine of business incident to a country lawyer's practice; although the most impor-

tant litigations in which he was engaged related to actions of ejectment, and proceedings for the confirmation and settlement of Mexican land titles.

Mexican land grants were generally of a given number of leagues of land lying within territorial limits of much larger extent. The boundaries of the specified number of leagues granted were not marked out or designated with certainty by the government which had made the concession, This being the condition of the grantee's title, he insisted upon his right to the possession of all within the out-boundaries of the general area designated in his title deed, called the *titulo*, on the ground that the government had granted him a specific number of leagues within a district of country of larger extent, and had authorized him, by virtue of the concession, to enter upon it and possess it until his specific quantity of land might be laid off and assigned to him by the government, whose right and duty it was to apportion to him the quantity granted.

To persons having no pecuniary interest in the question, the position of the grantee seemed well founded; but a certain class of citizens, who acquired the name of Squatters, denied the claimant's pretensions, and there were some who denied that the grantee had a right to more than the quarter section on which was his dwelling house; because, as they reasoned, he could not say with certainty what portion of the general tract would fall to him, even if the government should confirm his title to the number of leagues specified in his grant.

There were a few lawyers who took this extreme view of the question, and urged on the settler class to enter upon and occupy these lands as a part of the public domain. Thus encouraged, the settlers, coveting the chosen domain of the Mexican grantees, boldly entered and ousted them from their lawful possession.

Judge Currey's view of the question accorded with that of the grantees, whose rights stood protected by the constitution of the United States and by the treaty between Mexico and the United States, by which California became subject to the sovereign authority of our government, whose duty it was to protect the Mexican grantee in the possession of all the lands described in the grant, until the quantity specifically granted could be set apart and assigned by government authority to its rightful owner. His opinions on the subject became known to the people, and therefore his services were sought by the holders of these titles, for the recovery of the possession of the lands of which they had been ousted by trespassing settlers. Though the squatters were united and defiant, encouraged as they were by their lawyers, he brought and prosecuted action after action against them, until in the course of years, there remained not a squatter upon the lands he was employed to recover.

In the trial of these actions of ejectment, it sometimes became necessary to establish the plaintiff's right to the possession of the parcel of land sought to be recovered, by proving the out-boundaries of the general tract within which was the designated leagues of land granted. This was done on the part of the owner, by proving his occupation of it as the range over which his cattle grazed, and from which he collected and gathered them up to his rodeo grounds for rodeo purposes, which in part was for the benefit of his neighbors and others, who were notified to appear at the rodeo grounds to select and take away their stock which had strayed within the boundary lines of the rancho, within which the owners of strayed cattle had not the right to enter to regain them. This proof was made by the testimony of his neighboring colandantes, who recognized and respected the limits and boundaries of his occupation as the boundaries of his rancho. This occupation was known as the rodeo possession, and was occupation according to the course and custom of the country under the Mexican law while California belonged to Mexico. The same rule of evidence of the right of possession was recognized by our first legislature in an act defining the time for commencing civil actions. The mode of proving possession was in part adopted in the action of ejectment of *Marsh vs. Leonard*, for the recovery of Marsh's Landing, in Contra Costa county.

It was in that case that one Bleakley, a swift witness for the defendant, who in his direct examination seemed to hear readily all questions put to him, on the cross-examination feigned to be deaf and required that each of the questions propounded to him should be repeated. Judge Currey, who was making the cross-examination, assuming the witness to be sincere, so conducted it as to effectually expose the pretense by which the witness, in his state of nervous trepidation, designed to gain time in order to avoid the scrutiny to which he knew he was to be subjected. The ruse to which the witness resorted did not succeed. Judge Currey's voice, in putting his questions, gradually fell into an undertone, but Bleakley heard everything. When he retired from the stand the spectators who had listened in hushed silence, greeted him with suppressed jeers as he passed out of the court room, and the verdict for the plaintiff showed that the testimony of Bleakley, which was designed to be conclusive against the plaintiff, was esteemed by the jury of no weight.

In the trial of causes and in arguments before courts and juries, Judge Currey was earnest and sincere. In the discussion of questions of law or act, he was direct and positive. He never attempted to flatter or compliment either judge or jury. In trials lasting through two or three days, he rarely exceeded an hour and a half in argument; with the facts fresh in his mind, and warmed up in the contest, he spoke rapidly and earnestly, presenting the salient points upon which the verdict, in his judgment, must

depend. This was his way, and his general success before courts and juries verified the correctness of his judgment. He claims that he never made an argument before either a court or jury that exceeded four hours in time, and very few exceeding two hours. He made no pretensions to eloquence. He was not eloquent in the popular sense of that word, but he had the power of carrying with him courts and juries to a degree equalled by only a few of his cotemporaries, if any, at the bar where he practiced.

This was owing to his truthful dealing with the law and facts of the case which it was his office to present to courts and juries. His orderly arrangement of the facts and their logical presentation enabled the jury to easily understand the points in issue. He made no mistakes in the names of parties or witnesses, and he lost no time in his reference to the decisions of courts and the works of text writers, which he cited to support his positions. Thus he avoided the tedium of delay, which often operates to the disadvantage of the advocate. His ready memory of decided cases, by their names and the volumes where found, and of the particular parts of text books, was of inestimable advantage to him, especially where a point or question that could not have been anticipated, was sprung upon him in the course of a trial. In one instance a motion was made to nonsuit the plaintiff, whom he represented in an action for damages. The court was inclined to grant the motion, but at his request allowed him to produce two cases, which he mentioned, as an answer to the defendant's motion. The cases were produced in a few minutes and read to the court. The motion was denied, and the plaintiff recovered a verdict for a large sum of money. Being congratulated by his friend, B. C. Whitman, upon his narrow escape, and complimented on account of his ready memory, he answered that the last time he saw the cases, which he so suddenly called to his aid, was eight years before, while practicing his profession at Kingston in New York; and as to his memory, he said it was not so much a matter of culture as it was of inheritance, an inheritance from his mother of blessed memory.

Judge Currey possessed the faculty to a remarkable degree of remembering persons whom he might have casually met, and was rarely unable to call them by name. This faculty is esteemed as particularly useful in business of a public nature.

In the trial of causes, Judge Currey was always on the alert for his clients' interests. In the case of Riddell vs. Shirley and others, which was an action for damages in a large amount, in Solano county, he discovered that many of the jurors were in strong sympathy with the plaintiff, which boded ill for his clients, the defendants. To avoid a fatal result, he moved the court to require of the jury a special verdict in relation to certain matters of fact, to be rendered with their general verdict. The request was granted and a special verdict was rendered with the general verdict. The general

verdict was for the plaintiff in a large sum, but the special verdict was inconsistent with it. The court before whom the case was tried held the two verdicts not so inconsistent as to prevent a judgment on the general verdict, but the Supreme Court (5th Cal.) decided otherwise and reversed the judgment. The plaintiff afterwards abandoned his action, for which he was adjudged to pay a large bill of costs.

The practice of requiring of biased and sympathizing jurors a special verdict as to controlling facts, oftentimes prevents gross injustice, as it undoubtedly did in the case of *Riddell vs. Shirley*.

One of the most memorable cases in which Judge Currey was concerned, was that of *Waterman vs. Smith*, which was ejectment for a parcel of land within the patent for the Suisun Rancho. Smith defended on the ground that it was a portion of the Tolenas Rancho, which was an older Mexican grant than the Suisun, and that though it had not been patented, he was in the position to defend against the Suisun, as a person against whom the patent of the Suisun was not conclusive.

Each of these grants was of a given number of leagues—the Suisun four, and the Tolenas, three—within tracts of larger dimensions than the number of leagues designated—that of the Tolenas especially being within an area of much larger dimensions. Both grants in their general descriptions, embraced the particular parcel for which the action was brought.

The Suisun had then been confirmed, surveyed and patented to Archibald A. Ritchie, who had succeeded to the original Mexican title granted to Solano, the Indian chief, and his patent covered the land in dispute. The Tolenas had been confirmed, but not surveyed nor patented.

At the trial, the plaintiffs were represented by Judge Currey, with whom was associated Judge Harry I. Thornton, then lately one of the commissioners appointed under the Act of Congress, passed March 3, 1851, to ascertain and settle private land claims in California, and James D. Thornton since then for many years a Justice of the Supreme Court of this State. The defendant was represented by B. C. Whitman, R. Augustus Thompson, who also had been a Commissioner under the Act named, and his partner, Henry P. Irving.

Judge Currey conducted the trial for the plaintiff until the case was rested on the plaintiff's part. The defendant's counsel then opened, stating the nature of the defense, and proceeded to introduce evidence, when objection was made that as the opening showed the Tolenas to be an inchoate and imperfect grant of three leagues within an area of at least twelve leagues, from which the number of leagues granted could be laid off outside the patented lands of the Suisun, the evidence offered was incompetent to establish a right in the defendant against the patent of the Suisun—that the interest claimed by the defendant was not of the nature which could be made

available as a defense under the 15th section of the Act of Congress of March 3, 1851, as a title superior and paramount to the Suisun title, which had by confirmation, survey and patent, become a perfect title.

In answer to the objection the Court, (E. W. McKinstry), said: "If your position is correct, I ought to stop the trial here and direct the jury to find a verdict for the plaintiffs." To which Judge Currey replied: "That is what we think your Honor ought to do." The Court, however, overruled the objection, to which there was an exception, and the trial went on for seventeen days longer, resulting in a verdict for the defendant.

The 15th section of the Act of Congress of 1851, had not before then received judicial construction, and now the time had come to determine the character and quality of the interests against which a patent was not conclusive. From the judgment in favor of Smith, there was an appeal to the Supreme Court, and there it was argued on behalf of the plaintiff by J. D. Thornton and Judge Currey, and on behalf of the defendant by Judge Thompson and Mr. Whitman. Judge Currey's position before the Supreme Court was that the character of the interests of third persons mentioned in the 15th Section of the Act of 1851, must be of a nature and quality constituting right and title superior and paramount, which could be interposed against the United States and all the world; that the Tolenas though confirmed as a valid grant, was an imperfect title, which as yet had not been attached to any particular three leagues within the territory described in the original grant to Armijo, and that until so attached to three particular leagues, the Tolenas title to a specific tract of land must be held to be an imperfect title, and therefore the defendant claiming an interest in the parcel of land in controversy for which the action was brought, under the Tolenas and within its general area of twelve or more leagues, was not in a position to resist the patented title of the Suisun, which the Government had by confirmation, survey and patent attached to the parcel of land in dispute. He maintained that it was the duty of our Government to confirm all valid claims issued from the Mexican nation, which were inchoate and imperfect grants, and to segregate the quantity granted and to issue to its just owners a patent for the same—that our Government had the right and authority to lay off and set apart to the confirmer, the designated quantity granted wherever it deemed proper within the general area designated in the original concession; and that having exercised such authority in the Suisun case, the persons claiming under the Tolenas, which was an inchoate and imperfect grant of three leagues within a described area of twelve leagues or more, were concluded by the confirmation, survey and patent granted to Ritchie of four particular leagues of the Suisun.

In his discussion respecting the duties, obligations and powers of our government in relation to California land claims of inchoate and imperfect char-

acter, his position was that such claims required action on the part of our Government to render them definitively valid, and annex them to a specific quantity of land, so as to make perfect the title which before was imperfect; and that such claimants were required, in order to secure perfect titles, to apply to and submit themselves to the tribunals provided by the Act of Congress of March, 1851; but he denied that persons holding perfect titles derived from the Mexican Government were bound to submit the same to the adjudication and decision of such tribunals, or otherwise lose their property, which he argued on principle and authority would be in effect confiscation, in violation of the law of nations, and of the Constitution of the United States, as well as a violation of the stipulations of the treaty by which our nation acquired California.

In speaking for himself and his associates, he said: "It is not to be presumed that Congress intended to coerce the owner of a specific tract of land by title absolute, to submit his title to the adjudication and determination of the tribunals constituted by the Act of 1851. That such an owner might submit his title to be passed upon and declared valid by the tribunals mentioned in said Act of Congress, may be admitted; but that he was obliged to do so or lose his land, we must, with respectful deference for the opinions of those who differ with us, deny."

Mr. Justice Field, now of the Supreme Court of the United States, was then a Justice of the Supreme Court of California. In his opinion in *Waterman vs. Smith*, reversing the judgment of the District Court, in speaking of the patent of the Suisun to Ritchie, Justice Field said, "The patent is conclusive evidence of the right of the patentee to the land described therein—not only as between himself and the United States, but as between himself and a third person, who has not a superior title from a source of paramount proprietorship." And further he said that, "The third persons against whose interest by the 15th section of the Act of 1851 the final confirmation and patent are not conclusive, are those whose title is at the time such as to enable them to resist successfully any action of the Government in respect to it."

The opinion of Justice Field, it is to be observed, recognized the fact that there are titles superior and paramount which can be used successfully in resistance to any action of the United States in respect to them, and that, as stated in the syllabus of the case, "No law authorizes the forfeiture of any rights of property under the Mexican grant, for any act or omission on the part of the grantee, since the treaty of Guadalupe Hidalgo."

That all the justices of the Court so understood this decision is manifest from an expression of Justice Baldwin, in an opinion delivered by him at the same term of the Court, in the case of *Gregory vs. McPherson*, wherein was involved the title of a Mexican grant made in 1838. He said, "The claim for

the ranch was duly presented to the Board of Commissioners under the Act of Congress of 1851, and was confirmed by its decree, and also by that of the United States District Court on appeal (though this proof was not necessary, as no forfeiture accrues of a title otherwise good, as we have intimated in a recent case, by failure to present it to the Board.)"

A lengthy reference has been made here to the decision in *Waterman vs. Smith*, because it was the first great leading case giving construction to the 15th Section of the Act of 1851, and was a decision in which it was implied, at least, that a title in fee simple absolute could be set up in resistance to any action of the United States in respect to it, and because it has an important relation to the doctrine laid down in the opinion of Justice Currey, in the case of *Minturn vs. Brower*. In this latter case, which is reported in the 24th Cal., the Supreme Court of this State decided that the Congress of the United States had not the power under the constitution and treaty of Guadalupe Hidalgo and the law of nations, to forfeit a perfect title of Spanish or Mexican origin because the holder of such title had failed to present it to the Commissioners appointed under the Act of Congress of 1851 for confirmation.

The law as declared in *Waterman vs. Smith* has been followed from the time the judgment in that case was pronounced, and the decision in *Minturn vs. Brower* has stood for twenty-five years as a just exposition of the law therein considered.

Another case involving a large amount of property and the consideration of important questions of law and equity, was that of *McMillan vs. Richards* (9 Cal.) in which Judge Currey appeared for the defendant. It was tried before the Court (Judge McKinstry), which gave judgment for the defendant. In this case were involved the law of mortgage and the effect of a foreclosure; also the question of redemption and who were redemptioners, and also the law of tender. The Supreme Court on appeal reversed the judgment. In his argument in that Court Judge Currey examined at length all the questions on which the case depended, and was complimented by the Court for his effort, which, he says, was the only recompense he ever received for his labor in this case, unless it be that a very full report of his argument, with the decision as reported, may be considered recompense in some degree.

He has never been reconciled to the decision as a just exposition of the law relating to the questions considered, and he says he never could understand why the question of tender, which was one of the great questions in the case, was entirely ignored.

In the course of Judge Currey's professional life in the country, he prosecuted three important Mexican land cases on appeal from adverse decisions of the Board of Land Commissioners. These cases were the "Los Putos,"

for ten leagues in Solano County, "Yokaya," for eight leagues in Mendocino County, and "Los Meginos," for two leagues in Contra Costa County. Each of these cases involved unusually difficult questions. Each was confirmed by the United States District Court. The commissioners appointed under the Act of Congress by President Pierce dealt severely with grants of large areas. But it should be said of Judge R. Aug. Thompson, a member of the Board, that he took a sensible and just view of all cases submitted and did not allow himself to be influenced by the consideration of quantity.

In this connection I may allude to a conversation I had once with Mr. R. C. Hopkins, who for so many years was the keeper of the government archives in the U. S. Surveyor General's office at San Francisco.

"My occupation for many years," said Mr. Hopkins, "in connection with the settlement of Spanish and Mexican land titles caused me to have much intercourse with most of the early actors on the judicial stage of California; and gave me frequent opportunities of observing their most prominent features of character. Judge Currey, both on the bench and at the bar, in the many complicated cases with which he had to deal, especially in questions arising in the settlement of Spanish land titles, has come as near to bringing order out of confusion, and to harmonizing discordant elements, as has any one who has ever attempted this most difficult task."

Judge Currey also had his share in the prosecution and defense in criminal cases. He would not consent to prosecute except in cases of flagrant crimes, when called upon by the people to aid the public prosecutor. In the case of Monroe who murdered Gordon, he prosecuted at the request of the people of Contra Costa County, who had become greatly alarmed by the terrible enormity of the crime. Monroe was convicted upon the testimony of an accomplice. The question of corroboration of his testimony was one of difficulty, which was overcome. Monroe was executed after having fully confessed his guilt.

In about a dozen of cases in which Judge Currey was engaged in defence of persons indicted for murder, there was only one in which the accused denied having committed the homicide. In that one instance the defendant who was a man of respectable character was prosecuted with unusual vehemence, but he was acquitted, as there was no reasonable doubt of his entire innocence. In all the other cases the defence of justifiable homicide or accident was interposed successfully, except in one case of conviction of murder, and in another the defendant, Gilman, was convicted of manslaughter. Gilman was sent to State prison for three years. While this man was in prison he called on Judge Currey who was attending court in San Rafael, in Marin county. He came in his prison garb to pay his respects to his counsel who had defended him so well as to save him from the extreme penalty of the law, and to inquire respecting the prisoner's family who lived in the

Montezuma hills in Solano county. Judge Currey expressed his surprise at meeting him at large, and upon his inquiring how this came to pass, was informed by the prisoner that he was in town helping to build a house for Dr. Taliaferro, who was at that time the prison physician. The next morning Judge Currey met Gilman in the street and was told by him that General James M. Estill, who was the superintendent or warden of the prison at San Quentin, had some cattle in the Montezuma hills and had been talking of sending some men there to gather them up, and that he had been informed that he could go along with these men to help them and that at the same time he could see his family. He also spoke of the intention of the old General to put him in charge of his farm at Corte Madera, a mile or two from the prison. In answer to him Judge Currey said he did not see but that he, Gilman, was as free as any man, and that he thought the General might permit him to have his family with him on the farm. It was but a short time afterwards that Gilman was allowed to go with the General's men to the Montezuma hills where he visited his wife and children, and soon after took charge of the General's farm, where he collected his family around him, and while there, as yet a prisoner, another child was born to him. Such was the management of General Estill who did about as he pleased with his forces at San Quentin.

The case of *Minturn vs. Brower*, before alluded to, presented for the consideration of the Court, the necessity of deciding as to the power of Congress under the constitution of the United States and in view of the law of nations, to require of the owner of lands in California by a perfect title or by title in fee simple absolute, derived from the government of Mexico, and existing at the date of the ratification of the treaty of Guadalupe Hidalgo, the presentation of his claim and title to such lands, to the Board of land commissioners established under the act of Congress passed on the 3rd of March, 1851, entitled "An Act to ascertain and settle private land claims in the State of California;" "and that in case he failed so to do within the time specified, his lands should be deemed, held and considered a part of the public domain of the United States." The opinion of the court was written by Judge Currey, in which it was held on the authority of many decisions of the United States Supreme Court, and one in particular of the Supreme Court of California, and under the provisions of our constitution and the stipulations of the treaty, that such titles stood protected against forfeiture for failure to submit them to the jurisdiction of the Board of Commissioners. This opinion received the concurrence of all the other justices of the court and was for nearly twenty-five years the rule of decision of the courts of California. It has been approved by the greatest lawyers of the State with scarcely a dissent. However, the doctrine of this case has been overthrown by the Supreme Court of the United States

in the late decision of that court, in the case of Dominguez against Boteller and others, on the ground that Congress possessed the power assumed in the Act of 1851, as a necessity for the effectuating of its policy in respect to the ascertainment of the boundaries of the lands of the government.

Though the authority of the Supreme Court of the United States is paramount in the premises and is submitted to as such, the question is open to the student of the principles of constitutional law and equity jurisprudence, for himself to determine which side of the question is best sustained by reason and justice and the principles of national and constitutional law.

Hon. A. P. Catlin, whose long and close acquaintance with Judge Currey has been referred to, speaks of him as a lawyer and a judge in the following terms:

"His life at the bar was spent for the most part in a country practice. For many years before being called to the bench, it may be said, there were few cases of importance in the district comprising Contra Costa, Solano, Napa, Sonoma and Marin Counties, in which he was not engaged on one side or the other, as the leading counsel. It was before juries of solid men, men of substance, men of independence of character, men generally of a ripe experience and good intelligence, that the qualities of Judge Currey's mind and character proved a tower of strength to his clients. Here he acquired a justly earned fame as one of the ablest and most reputable lawyers in the State. His successes were not ephemeral, were not obtained by dexterous expedients, nor by mere temporary advantages, but they were solid victories. To a court he held up the law only as it appeared to his evenly poised and well stored mind, and thus always commanded a just confidence in his opinions. To a jury he addressed only words of truth and soberness, in bold, unvarnished and unambiguous phrase. His experience among such men, both in New York and California, had taught him that the judgments of men, not their imaginations, nor even their feelings or prejudices, were the citadel to be assailed in controversies involving the material rights of person and property, and that, in the long run, this course of dealing with Courts, juries and witnesses would be appreciated. His power to elicit the truth from the most acute or reluctant witness, by the peculiar force and method of his examinations, was regarded among his clientage as something almost wonderful. It was the common belief among the people that no witness could stand before Judge Currey and repeat a false story in Court on either side of the case."

On the first day of January, 1864, the justices of the Supreme Court of California who had been elected under the amended constitution of 1863, assumed the duties of their offices. By allotment of terms, they stood in the following order: S. W. Sanderson drew the term of two years and became the Chief Justice; John Currey drew the term of four years; Lorenzo Sawyer the term of six years; A. L. Rhodes the term of eight years; and O. L. Shafter the term of ten years.

For the next four years these gentlemen, Judge Sanderson being re-elected, labored together in great harmony and performed a vast amount of judicial work. They were all industrious and indefatigable in their labors. The important and novel character of the litigation during that time was

quite as great if not greater than at any other period of the State's history, as the reported decisions of the court during those years show.

The importance and amount of work done by Judge Currey during his term, comprehending a range of subjects embracing questions of Mexican law, actions of ejectment, mining laws, suits in equity and criminal cases, and other matters of litigation, are of record, beginning with the 24th volume of the California reports and ending with the case of Wright vs. Ross in the 36th of such reports.

With the Mexican law relating to land titles and grants of land from the Spanish and Mexican governments, he had become familiar in his practice and brought with him to the bench a knowledge which was ready at hand in dealing with questions involving considerations of the law under which that class of titles were derived. To some of his opinions as a justice of the Supreme Court in relation to Mexican law, I here refer as interesting and instructive legal learning upon subjects with which eastern lawyers are not conversant, and as exhibiting Judge Currey's familiarity with the laws and customs of the Mexican people relative to land grants; as well as his capacity and method in dealing with the subject of those laws.

In Thornton vs. Mahoney, 24 Cal., he prepared the opinion of the Court, which held that the grantee of a Mexican title to a given number of leagues of land within an area of larger extent, had the exclusive right to the possession and enjoyment of the entire area, until the government might segregate and set apart to him the specific quantity granted. The opinion in this case is direct, clear and conclusive.

The doctrine of this decision was repeated in the case of Arguello vs. Greer, 26 Cal., by the same justice, who in the consideration of the question in the case, held that where a Mexican grant required that the land should be measured by the proper officer and that judicial possession of it should then be given to the grantee, the legal title remained in the Mexican nation, until such measurement and delivery of possession—and that until then the grantee acquired only an imperfect and inchoate title thereto; and that while this was the condition of the title, the right to determine the validity of the grant and give it a precise location, remained in the Mexican government until California was ceded to the United States—whereupon this right passed to the United States, whose duty it was to provide for the confirmation, measurement and survey of the proper quantity of land granted, and that when this was done by the United States the grantee was bound by its decision.

In the Arguello case, the contest was between the Arguellos, as the patentees of the Las Pulgas rancho, and the Greers, as the owners of the Canada de Raimundo, an inchoate grant, in which the Greers sought to recover a portion of the lands patented to the Arguellos, on the ground that

the particular lands in controversy belonged to the Canada de Raimundo and had been by mistake patented as a part of the Las Pulgas, and that they, the Greers, were under the 15th section of the Act of Congress of March, 1851, third persons whose interests were not concluded by the patent of the Las Pulgas. In relation to this question the court held that persons having an inchoate and imperfect title to lands in California derived from Mexico before the cession of California to the United States, are not "third persons" within the meaning of the 15th section of said Act of Congress; and further held that the "third persons" mentioned in said act, are those who have an interest in the land which would enable them to resist any action of the government in respect to it. As sustaining this doctrine reference was made to the opinions of the Court in *Waterman vs. Smith*, 13 Cal., *Biddle Boggs vs. Merced Mining Co.*, 14 Cal., and *Lesse vs. Clark*, 20 Cal., all of which were delivered by Mr. Justice Field.

In *Wilson vs. Castro*, (31 Cal. 421), one of the questions decided related to the law of descent to heirs and who were heirs under the Mexican law; and as to the status of a surviving widow as an heir of a deceased husband under that law; and another related to the effect of a confirmation of a Mexican grant made to persons who supposed they were heirs when they were not heirs. The court held that such confirmation enured to the benefit of the true heirs, and that the confirmees held the title in trust as trustees of a constructive trust for the true heirs by descent cast of the deceased person.

This decision has been regarded by all courts in which it has been cited as a leading case on all the questions therein considered.

In the elaborately argued case of *Fuller vs. Ferguson* (26 Cal. 547) Justice Currey examined and considered the Mexican law of separate and community property of husband and wife and the nature and character of their partnership relation, and the husband's right to the exclusive management and control of their community property under that law.

This case is one of instructive interest and is exhaustive of the subject.

Merle vs. Matthews (26 Cal. 455) was a case involving two questions of much interest under the Mexican law. These questions were carefully examined by Justice Currey, and since then have been definitively settled by this decision.

In the first place the decision was that a conveyance of land by deed under the Mexican law, need not express upon its face the price or consideration rendered—that this might be shown by evidence aliunde the deed. Before this it had been decided otherwise. In the second place the decision was, that a conveyance of land by a Mexican citizen to an alien operated to divest the grantor of the estate granted and to invest the alien grantee with a defeasible estate in the land, which he would retain unless deprived of it by the sovereign authority, or by the proceeding of denouncement instituted by

and on behalf of a citizen of the Mexican nation, "which in its substantive characteristics was," as it is expressed in the opinion, "equivalent to inquest of office found at common law."

Morison vs. Bowman (29 Cal. 337) involved a question of Mexican law, and also one of election under the will of a testator who disposed of the separate and community property of himself and wife without reference to her interest in the latter kind of property.

To the student of Spanish and Mexican law the decisions referred to must prove of decided interest.

The decision in *Minturn vs. Brower* has been referred to. The question therein discussed and considered possesses much interest for the learned men of the bar residing in the countries of the United States derived by treaties of cession from Mexico. In it is involved the doctrine of vested rights of property and the protection of such vested rights under the constitution of the United States, against the power of adverse legislation by Congress.

The business of mining in California under the anomalous condition of things incident to the absence of any authoritative code of laws for the acquisition and security of property in the mines, became a fruitful source of litigation in the courts of the State. The courts found it necessary to adapt the rules and principles of the general laws of the land, to the new and novel circumstances and conditions of appropriation of portions of the public domain by individuals, for the purposes of mining. Associations of persons became necessary to the carrying on of mining work to advantage, and out of these voluntary associations arose complications involving questions of tenancy in common and mining partnership, and the extent of the powers of the individual partners of a mining concern. With these questions the Supreme Court as the court of last resort were called upon to deal and to settle in accordance with the principles of law and equity applicable to the ordinary cases of business transactions. It was a long time before the exact relations existing among the individual members of a company of miners associated in the business of carrying on a joint mining enterprise, were judicially settled upon a satisfactory basis. The solution of these questions was reached in the case of *Duryea vs. Burt* in 28th Cal., which was accepted by the mining lawyers throughout the mining regions of the Pacific Coast, as a just determination of the law on the subject, and the doctrine therein laid down was afterwards made the statute law of the State.

The decision in *Duryea vs. Burt* was followed by the judgment in *Dougherty vs. Creary*, in 30th Cal., which, in addition to the questions decided in *Duryea vs. Burt*, involved other questions of important interest to persons engaged in mining enterprises. It is a complicated and curious case and extremely novel in its circumstances.

The decisions in these, as well as in many other mining cases, were prepared by Justice Currey, and are fair specimens of his knowledge of the principles of law and equity applicable to this class of cases.

In the very interesting case of *Norris vs. Hensley* (27 Cal. 439) Judge Currey applied the Rule in *Shelley's Case*, in the construction of a will devising certain real property to three persons, "to have and hold their lifetime and then to go to their heirs and assigns; but never to sell it," and held that under the law the estate devised vested in fee simple in the devisees by virtue of the direction that it should "go to their heirs." The opinion is full and complete and reflects great credit upon its author as a learned exposition of the law relating to the question considered.

At the time of Judge Currey's elevation to the bench, the war for the suppression of the rebellion and the preservation of the Union was well advanced, and it was at that time that the "Legal Tender Act" of Congress was on its trial in this State. There was a great diversity of opinion among lawyers and others in respect to its constitutionality, and the opinion which most obtained in California, where gold coin was a medium of exchange, was adverse to the "Legal Tender Act."

The question of the constitutionality of the act was submitted to the Supreme Court in the case of *Lick vs. Faulkner*, (25th Cal.) The question was elaborately argued, and then assigned to Judge Currey to prepare the opinion of the court in the case. This he did, maintaining the law as constitutional on the ground that the issuing of the bills called "greenbacks," and making them a legal tender in the payment of debts, and so constituting them lawful money, was an act of sovereign behest, which was a necessary means for carrying into execution express powers granted by the constitution to Congress.

At the same time Judge Currey prepared the opinion and decision of the court in the Specific Contract Case of *Carpentier vs. Atherton* (25th Cal.) sustaining the act of the State legislature, on the ground that it was a remedial law for the enforcement of contracts in specie, for the payment of any particular kind of money, and holding that the Specific Contract Act was in no just sense repugnant to the Legal Tender Act of Congress.

These decisions were looked for with great interest by the business and commercial men and lawyers of the State; for there were those who believed that if the Legal Tender act was sustained, the Specific Contract act could not be. Perhaps there never was greater interest taken in any question before the Supreme Court than in the anticipated decisions in these money cases; but when decided the people seemed well satisfied, and, especially, was this so with the earnestly loyal men of the State.

The "Legal Tender Act" has been sustained by the Supreme Court of the United States, though not without a strong dissent on the part of Chief

Justice Chase and Mr. Justice Field, both of whom must have changed their opinions in respect to the constitutionality of the act of Congress, years after it was passed and became a law. This is what Judge Currey says respecting the opinions of these eminent jurists of the United States Supreme Court, and he says he speaks advisedly on the subject.

The foregoing opinions and decisions are only a few of the many prepared by Judge Currey, but they are among the most important. He had his share also of the criminal cases brought to the Supreme Court. The case of *People vs. Olwell* (28th Cal.), and *People vs. Pool* (27th Cal.), and *People vs. Batchelder* (27th Cal.), are elaborately considered, and involve vitally important questions in the administration of the law of criminal justice.

The merit of Judge Currey's compositions as a writer on legal subjects is to be seen in his briefs and arguments to be found in the California Reports, and in the opinions delivered by him while justice of the Supreme Court. These arguments and opinions are terse, strong, and direct, leaving no question discussed by him ambiguous or uncertain as to his views of the matter considered. No lawyer can complain if he fails to understand the point decided in the decisions prepared by him while discharging his duties as justice of the Supreme Court.

Mr. A. P. Catlin, the intimate friend of Judge Currey for more than forty years, in speaking of the judge's social position and family relations, and of his retirement from the active duties of a professional life, says :

"Judge Currey always stood high in social life. Those of his personal friends who have known him longest and intimately, speak of his many acts of kindness to his brethren of the profession who happened at times to feel the need of kindly assistance. He is now retired from the active practice of his profession. With ample means, and in the enjoyment of a green and healthful old age, he finds happiness in the society of an accomplished wife, affectionate sons, and hosts of friends. It is as a farmer upon a highly improved farm in Solano county that he, for the most part, finds work for an ever active brain. He has two sons, Montgomery and Robert, with collegiate educations, both of them having wives and children, and both being large and successful farmers in Solano county on lands of their own. They are prominent citizens of that county, one of them, Robert, having represented it in the legislature."

Mr. R. C. Hopkins who has already in the foregoing pages contributed his testimony to the character of Judge Currey as a lawyer dealing with questions pertaining to Spanish and Mexican land titles, adds the following as his general estimate of his friend of many years.

"Judge Curry is a close student, a clear reasoner, and gifted with an analytical mind. He is quick to perceive facts, their relations to each other, able to make proper combinations, and to draw just conclusions, and withal possessing principles of the

sternest integrity, and an honest purpose in the search of truth. With none of the old-time members of the California bar have I been better acquainted. Among them all, I think, I have not known a deeper thinker, a clearer or more just reasoner, a wiser or safer counselor, or a more genial companion than Judge Currey; ever ready to impart knowledge without pedantic arrogance, and to reprove and admonish without harshness. Such is my estimate of the salient points of his character, resulting from an acquaintance of more than thirty years."

Thus far this narrative has been confined principally to the character of Judge Currey as a lawyer and a judge. His part in public affairs of a political nature remains to be noticed.

From his earliest manhood he was a Whig in politics. One of his earliest votes was for William H. Seward for governor of the State of New York. For Mr. Seward he always entertained the opinion that he was among the greatest statesmen of his time. In 1840 he voted for General William Henry Harrison for president of the United States, and from that time he continued to be a Whig as long as there was a Whig party. Since 1860 he has been a prominent Republican. In the early part of 1851 President Fillmore nominated him to the United States Senate for the office of United States District Judge for California. He was recommended for the position to Mr. Fillmore, by his law preceptor, the Hon. William Nelson, then a member of the House of Representatives, and many others, of both political parties, of the counties in which he had practiced his profession in the State of New York.

He first received news of his nomination while on the Isthmus of Panama, on his way east from California, in February, 1851. At that time California was represented in the United States Senate by Dr. William M. Gwin and Col. John C. Fremont, and in the House by George W. Wright and Edward Gilbert. For some cause Col. Fremont was absent from the Senate at the time and continued absent, until Senator Gwin and his coadjutors of the House had accomplished Judge Currey's defeat.

In quarters where it would be effective, it was charged that he was not sound on the slavery question. This charge, it was supposed, had for its basis the fact that it was known that he regarded the institution of slavery as unjust in its nature, and ought not to be extended beyond its then existing limits; and beyond this he had openly expressed his condemnation of a certain provision in the act to regulate proceedings in civil cases, passed by the legislature of California at its first session in 1850, which declared that, "no person of one eighth or more of negro blood and that no person of one half or more of Indian blood should give evidence in any action to which a white person was a party, in any court in the State."

This was enough to place him under the ban of the pro-slavery men who were then in the ascendant in public affairs in California, and who used their power over the minds of the people, as a rod of iron. No one at that

time in the history of California politics who dared to say a word in opposition to slavery as an institution divinely ordained, could hope to escape the anathemas of the slavocracy. The general sentiment of the leaders of the Democracy, mostly from the Slave States, was that the negro had no rights that the white man was bound to respect. Such was the sentiment of the dominant race, in the early years of the history of slavery, said Chief Justice Taney in the Dred Scott case, and such it was at that time in California.

Judge Currey was not an abolitionist in the proper political sense of the term. He did not believe that he as a citizen of New York or California, had the right to intermeddle or interfere in the matter of slavery in the States where it was a legalized institution, but he did not admit that he had not the right to speak of it and discuss it as a moral and economic question, as well as to speak of and discuss the subject of polygamy in Utah, or other like questions.

More than twenty-five years after 1851, at a Pioneer banqueting in San Francisco, Judge Currey was called upon to respond to a toast to the judiciary, and at the conclusion of his remarks, Senator Gwin rose and said he had an apology to offer Judge Currey, and then proceeded to give an account of his opposition to his confirmation as United States District Judge. He charged the principal part of the blame on one Halsted, by whom the Senator said he was deceived, and he added that he availed himself of the occasion to express his regret for what he had been satisfied was an injustice to Judge Currey. This explanation was accepted as a satisfactory apology, and operated as the burial of the hatchet, which though rusted by time, was not until then put entirely out of sight.

In 1855, Judge Currey supported J. Neely Johnson for Governor, in opposition to John Bigler then serving his second term as Governor of the State, to neither of which terms was it clear beyond doubt that he was elected, but rather that he was counted in after the votes were cast. In 1857 and 1858, the Kansas imbroglio was a subject of engrossing interest throughout the land. The course of the administration of President Buchanan, in relation to the government of that territory and the attempt to impose upon its people against their will, a constitution making slavery an institution of the proposed State of Kansas, was fiercely assailed and justly condemned by a large portion of the people of the United States. Judge Currey was earnest in his opposition to the fraud formulated at Washington and attempted to be carried into execution at the town of Lecompton in Kansas, and he naturally fell into line with Senators Broderick and Douglas and others, in their war against the administration and the measure by it proposed for

- the enslavement of the people of Kansas.

The act of Congress known as the Kansas-Nebraska act repealing the Missouri compromise act, had become the law of the land, and though he

regarded it an unwise measure, he accepted it as the law, not fearing the result of the wager of battle between the people of the free north and the pro-slavery strength of the country, south and north. The predominant sentiment in California seemed to be in favor of making Kansas a slave State. Such was the sentiment, without doubt, of the leaders of the Democratic party and their subservient followers. Mr. Broderick succeeded in organizing about one-third of the Democratic element in opposition to the extension of slavery to territory already free, and which its people desired to remain free. This branch of the Democratic party was called the Broderick party, the Douglas party, the Anti-Lecompton party, indifferently, according to their likings.

At a convention of this division of the Democratic party held at Sacramento in June, 1858, Judge Currey was nominated for Justice of the Supreme Court; on the ticket with him was a candidate for Controller of the State. At the election which followed he led his associate on the ticket by about four thousand votes. Though defeated he lost no prestige with the party with which he had become allied. In the convention of 1859, he was nominated against his will and protest for Governor. Milton S. Latham and Leland Stanford were his competitors in the gubernatorial race—the former the candidate of the pro-slavery branch of the Democracy, the latter of the Republican party, which at the time did not number twelve thousand votes in the State.

The contest was mainly between the two wings of the Democratic party—the one led by Mr. Broderick and the other by Dr. Gwin, United States Senators at the time. The contest was bitter in the extreme. Judge Currey participated in the canvass and made many speeches. In all these he avoided personal and acrimonious attacks upon his opponents, and in the main was treated respectfully by them. Mr. Broderick was the target against which was hurled the vituperation of his enemies. Judge Currey had a strong aversion to stump speaking and he always said he was not a success in that department of oratory, although his friends appreciated and complimented his efforts. He made a speech at Nevada City during the campaign, in which he noticed the position taken by Mr. Latham and Dr. Gwin on the doctrine of the Kansas-Nebraska Act relating to the territories, and also noticed the conduct of the National Administration respecting our naturalized citizens, subjected by their parent governments to military service upon their visiting their native lands. Of his efforts in that speech the *Sacramento Union*, then the leading journal of the State, said: "His views on the Kansas-Nebraska questions are expressed with clearness, brevity and force. He shows that the position occupied by Messrs. Latham and Gwin on the former subject is untenable and contrary to the spirit of Democratic usage and principle. On the matter of the rights of our adopted citizens, he enunciates some new

ideas which we commend to the attention of our readers. They are sound, philosophical and just, and indicate that Judge Currey has examined the whole subject with the acuteness of a lawyer and the sagacity and comprehensive wisdom of a statesman. The opposition candidate (meaning Judge Currey) for Governor is making his way with much success. His pure character, high attainments, and good sound qualities of mind are beginning to be appreciated by the people of the State."

In July, 1859, he met his competitor, Mr. Latham, in joint debate at Weaverville in Trinity County. Mr. Latham opened and took occasion to taunt Judge Currey with having been a Whig and having voted for Mr. Fillmore for the presidency against Mr. Buchanan in 1856, and because of this had not the right to object to the policy and conduct of the administration. To which Judge Currey in his turn replied that it was true he had been a Whig so long as the Whig party lived, which he regarded as one of his honors. This frank statement had the effect to bring out vociferous cheering, as the Whigs of the State had in a large measure allied themselves with one or the other of the contending wings of the Democratic party. Continuing, he maintained that it was the right of every citizen to express his opinion respecting the administration of the affairs of the government whether he had aided to put the president in office or not. He admitted that he voted for Mr. Fillmore, and said that in doing so he voted for a much better man than Mr. Buchanan had proved himself to be.

The doctrine of popular sovereignty in the territories was a prominent subject of discussion during the campaign. It was contended by the administration party that this doctrine, when applied to the territories, interfered with the right of slave-holders under the law, as declared in the Dred Scott decision, to take with them their slaves into the territories and hold them there as slaves. The opponents of the doctrine of popular sovereignty called the popular sovereignty men the squatter sovereignty party. In a speech made at Placerville before a large audience in the open air, Judge Currey spoke fully on the subject, in respect to which the *Sacramento Union* said: "The speech of Mr. Currey at Placerville is a clear exposition of principle which is well worthy of being read by the people of the State. It is put forth without parade; and with the modesty that constitutes so material an element of his character."

In his discussion Judge Currey maintained that under the Kansas-Nebraska Act the people of a territory organized by an Act of Congress, had authority to pass such laws as they might deem just and for their interest and welfare, subject always to the paramount law of the constitution of the United States, and to that alone. In connection with his discussion of the question, he referred to the admission of Michigan in 1836, and California in 1850, into the union as States, and then said that by the passage of the

Kansas-Nebraska Act, Congress, with the approval of a great majority of the people, recognized as a principle the right of the people of an organized territory to form and regulate their institutions in their own way. But in regard to the question the Democratic party was divided, the administration wing holding that the people of an organized territory had not the authority to form and regulate all their domestic institutions in their own way, that such power could not be exercised until they formed a constitution with the view of being admitted as a State into the union. And then he propounded the question, "Is not the formation and adoption of a constitution by the people of an organized territory an act done in their territorial capacity? Then if the people of an organized territory can, in their territorial capacity, exert complete sovereign authority in forming such a constitution, what hinders the prior exercise of this power by the people in respect to their domestic or municipal affairs? I have propounded the inquiries to gentlemen of the administration party, but have received no answer explaining why the people are sovereign in the one case and not in the other."

He distinguished in this connection between popular sovereignty and squatter sovereignty. The former he held to be the exercise of sovereign authority under the grant of such authority to the people by Congress in the territorial act of organization of a territorial government. The latter was the attempted exercise of like powers without authority from the governmental source. At the next session of Congress, Mr. Douglas made a speech in which he made the distinction between popular sovereignty and squatter sovereignty made by Judge Currey in his Placerville speech, and the newspapers of the east proclaimed Mr. Douglas' speech as a solution of the problem until then unsolved and unexplained.

In this Placerville speech, Mr. Currey spoke of the slave constitution, prepared for Kansas at Washington and forwarded to the convention which assembled at Lecompton, and which adopted it and sent it back to Washington in defiance of the will of the people of Kansas, as their constitution under which the territory was to become a State; and he gave an account of the efforts of the President to coerce Congress and his party to admit Kansas under the constitution so prepared and adopted at Lecompton. He spoke of the employment of the power of the federal patronage which was brought to bear for the purpose of overcoming the opposition of Douglas and others against the measure; and said, "Those federal officers in the government who adhere to the position maintained by Mr. Douglas in respect to the Lecompton constitution were generally removed. If any such official wished to hold his office he had to hold his tongue also."

Following this he quoted with approval from a speech of a member of the House of Representatives from Georgia these words, "The man who follows party, because it is party, is a factionist. The man who follows prin

ciple and supports party because it follows principle is in the path of duty. When leaders undertake to overthrow principle, honest men should overthrow them. When the president undertakes to overthrow the principles of the Cincinnati platform, I shall seek to overthrow him. If that be infamy, I shall be infamous. The spirit of independence in the representative is the safety of the Republic; where it ceases, venality begins." And continuing, Judge Currey said: "As long as the mind of man, in its development and advancement, approximates towards the perfection of the Deity, so long will the principles of civil liberty live and endure. The object of all honest investigation is to ascertain the truth. What is the truth, we should ever inquire, and when we have ascertained it, we should follow wherever it may lead."

Notwithstanding the general bitterness of the controversy between the two wings of the Democratic party at the time, Judge Currey excited no bitter enmities of those opposed to him, but on the contrary was treated as a general rule with friendly consideration. The party of which he was the standard bearer was comparatively new, and though fairly well organized, it was without the strength of patronage, as it was opposed not only by the administration party of the general government, but also by the influence of the State government, at the head of which was John B. Weller, the Governor. The possession of the Federal and State offices by the administration party, gave it a great advantage. With that party were the spoilsmen and camp followers, who were actuated by no feeling of justice for a people who were struggling to maintain themselves against the power of oppression. The rank and file, as usual in a chaotic condition of parties, desired to be with the majority and therefore followed where was the greater appearance of the strength of numbers. Under these adverse circumstances, the Free State party had to struggle in an uphill fight, against the power and influence of the general and State governments.

The result of the election is a matter of history. The pro-slavery party triumphed; but notwithstanding this result, much was gained for the cause of constitutional liberty and human freedom.

The campaigns of 1858 and 1859, it is believed by many, saved California from joining the seceding States in 1861. During the campaign of 1859 the party led by Mr. Broderick, Judge Currey, and others, hoped for some aid from Mr. Douglas, by speech or letter, while laboring for the maintenance of the principles for which he had manfully fought in the Senate and before the country, but not a word or sign of encouragement came from him. When the election was over and the day was lost to the friends of popular sovereignty, it is said on good authority that Mr. Douglas wrote a letter to Mr. Latham congratulating him upon his triumphant victory.

It was known at the very beginning of the campaign of 1859 that Judge Currey was dissatisfied with the place assigned him on the ticket. His

ambition was not for political advancement. He preferred a judicial position as in the line of his profession. The story was told of him by Judge Robinson, who greatly enjoyed it, that on one occasion when Judge Currey had come into Sacramento from the mountains, they met, whereupon Judge Robinson entered upon an inquiry as to the campaign and the prospects in the country, to which Judge Currey responded, in general terms, that the prospect looked fairly encouraging, and then turning the conversation he said that while travelling in the mountains he had been considering a legal question about which he wished to consult him (Judge Robinson), and thereupon they entered upon a discussion of the legal proposition. Judge Robinson was accustomed to relate this incident with mirthful gusto, at the expense of Judge Currey, who manifested a much greater interest in matters pertaining to the law than in the exciting political questions of the campaign.

At the session of the legislature in 1862 a bill was introduced into the assembly for the repeal of the obnoxious act of 1850, which declared Negroes and Indians incompetent as witnesses in any action to which a white person was a party. But even then, with a majority of Union men in the assembly, the bill failed to pass, so inveterate was the prejudice of the majority of the people of California against Negroes and Indians. In 1863, the war having worked out a change of sentiment, the same bill was again introduced into the assembly, and passed by a large majority, and also passed the senate and became a law. There were many opposed to the repeal of the obnoxious law, in 1862, who were eager for its repeal in 1863, and who at that time wished to have it believed they were anti-slavery men in ante-bellum times.

Under the constitution as amended in 1863, Judge Currey was elected a justice of the Supreme Court of the State, and for the next four years served in that capacity. What he did and how he discharged the duties of his office during that term is a matter of record. In 1867 the Republicans renominated him for the same position, but he went down with his party, not because he had failed to meet the expectations of the people, but because of party and political misfortunes for which he was in nowise responsible, and which are fresh in the recollections of many still living.

Respecting him as a jurist and citizen, an eminent lawyer who has known him long and intimately, says:

"The four years of Judge Currey's service on the bench of the Supreme Court commenced with the January term, 1864, and expired with the October, 1867. Volumes 24 to 34 of the official reports contain his opinions. He was Chief Justice of the court during the years 1866 and 1867. With Sawyer, Sanderson, Rhodes, and Shafter, all of whom were eminent judges of distinguished reputations, these four years formed a memorable era in the judicial history of the State, during which more by far than in any other four years of its history were produced decisions of importance delivered in opinions of incalculable value on account of the legal learning embodied in them, and the admirable and classic English in which they are expressed.

"Of all the judges of our highest State tribunal from the beginning of its history, the three who bear the highest reputation among critics, as judicial writers, Nathaniel Bennett, Stephen J. Field, and John Currey are named. In severe simplicity of diction, directness of logical order, clearness of expression, aptitude of illustration, and force of argument, there are those who think Judge Currey not rivalled by any who came before, served with, or who succeeded him on the bench.

"However much the imagination may be successfully employed in illustrating a severe rule of law, or a liberal principle of equity, we find that our subject will have none of it. He either has it not or disdains to use it in his expositions of the rules of even-handed justice. He, evidently, has been a close student and admirer of the old English and American common law judges and chancellors, and, though recognizing the necessity as well as policy of changing ancient and obsolete rules and adapting them to the advanced conditions and greater intelligence of his own age and times, he yet never felt it safe in the purpose of perpetuating principles of law for the use of succeeding generations, to embalm them in anything less enduring than the unadorned, lucid, and forceful style of the ancient sages of the law."

Here ends my account of Judge Currey's public career. It was stormy and full of disappointments; but in the retrospect of these years, he is able to say that he has never bowed himself down before the oppressor, nor subordinated man's right to liberty and the pursuit of happiness to brute force of superior might. As a judge, he was honest and just. With his professional brethren he lived upon terms of amity and friendship. Towards young men of his profession he was kind and considerate, both at the bar and on the bench, which many now in full practice gratefully remember.

In 1870, after his retirement from public life, Williams College conferred on him the honorary degree of Doctor of Laws. In 1881 he was married to his second wife, a granddaughter of the Hon. William Nelson, his law preceptor and friend of many years; and now in the evening of life he still finds occupation in pursuits of law and literary studies, and in governmental and political affairs, as also in the cultivation and improvement of his farm, for which he believes he has an inherited taste and inclination.

Some of the names of Judge Currey's professional compeers are here mentioned as men of distinguished ability and learning. Judges Harry I. Thornton and R. Augustus Thompson who had been commissioners for the ascertainment and settlement of private land claims in California derived from Mexico, were men of learning and great moral worth. E. W. F. Sloan was a man of great erudition in law and equity jurisprudence, whose statements to courts upon a given question were always accepted as accurate and truthful. Tod Robinson was an analytical reasoner, whose elucidations "o'er all the dark a silvery mantle threw." Colonel E. D. Baker, an orator of national fame, was a philosopher in dealing with the law of evidence and the natural instincts of human life and the motives of human action. James A. McDougall was a man of profound thought, though not an easy speaker. He was a close and cogent reasoner, scarcely equaled by any

other member of the bar. Charles H. S. Williams was a master of commercial law and a learned and skillful pleader, bright, strong and somewhat aggressive in the argument of causes. B. C. Whitman, the courteous gentleman, was an honorable lawyer, and a good citizen in all the relations of life. Jos. W. Winans, the encyclopedia of literature, was an active and ever watchful advocate. John R. McConnell was deeply read in the black letter lore of the law. He could not, with becoming patience, brook contradictions. A. P. Crittenden, whose amiable fairness in his practice was admitted by all, and whose researches were exhaustive, was distinguished as an able contestant for the prize in view. Judge Thomas of Santa Rosa was a man of sound learning. He entertained strong contempt for professional charlatans. Oscar L. Shafter was a man of massive intellectual strength and unequalled forensic power in debate. Henry S. Foote, once governor of Mississippi and afterwards a United States Senator, was amiable in disposition yet of impulsive and impetuous nature, a most interesting conversationalist, astute and quick as a lawyer, able in debate and a most agreeable companion. Jo. G. Baldwin was an able and learned lawyer whose strength of statement and argument flowed through his pen, whose exhaustive fund of humorous anecdotes made him the delightful companion of all his friends. Frederick P. Tracy was a man of sturdy eloquence as a political debater, a man who hated the institution of slavery and would accept no apology for its origin or continuance. His law education was defective, having entered upon the study late in his life. Balie Peyton, once a Whig member of Congress from Tennessee, was a man of impassioned eloquence, of kind nature, the friend and champion of the squatters of Solano and Contra Costa. William A. Duer, the partner of Peyton, was a man whose intellect shone with unclouded luster, and whose learning in commercial law was deep and clear. Gen. John Wilson, the senior member of the California bar, was the devoted friend and champion of squatters and the defender of squatters' rights. He was always pleasant and even joyous sometimes when his cause was lost. Henry Edgerton was the giant orator. He was logical and profound in debate. He was warm in his attachments to his friends but careless of life's opportunities.

"A solitary rock
In a far distant sea,
Rent by the thunder's shock,
An emblem stands of thee."

These and others were Judge Currey's friends and the companions of his early professional experience in California. This experience he holds in remembrance as the most enjoyable part of his California life.

"Most of his early professional compeers," writes Mr. Hopkins, "have gone down in the battle of life, and their voices have ceased to echo in the halls of justice, while he, although more than seventy winters

have passed over his head, still stands vigorous as the mountain oak, having brought the sunny cheerfulness of youth down into the winter of age. With an unclouded mind enlightened by wisdom and experience, and a memory stored with amusing anecdote, he is still an instructive and pleasant companion alike to the old and the young; and taking a cheerful view of human existence, he is gliding gracefully down the vale of years, aiming to

“Husband out life’s taper to the close,
And keep the flame from wasting by repose.”

CHAPTER XXXV.

George A. Johnson of Sonoma—A Graduate of Yale—Professor of Greek and Latin—On the Bench in Indiana—A Triumphant Career in California—In the Constitutional Convention and Legislature—Attorney-General of the State—The Great Railroad Tax Cases—The Chinese Exclusion Act—The General's Presentation Address to the President of the Constitutional Convention of 1878.

To be Attorney-General is to have THE STATE for a client; and the place is one to dazzle the professional eye. Of those who have held the high office in California, the majority have met its responsibilities with signal ability and dignity. Not to go through the entire list, we see in striking prominence John R. McConnell, William T. Wallace, Thomas H. Williams, Jo. Hamilton, J. G. McCullough, and A. L. Hart. These men, distinctively lawyers, have imperishable monuments in their work, evidenced in part by their correspondence with the executive, and their communications to the legislature on weighty questions, and by the Supreme Court reports. The present attorney-general has maintained their standard. A finely educated man, generally, he is, too, a trained lawyer and a strong man of counsel on whom the commonwealth can lean. He and Supreme Judge Works, while opposite in politics, recall each other—coming to this shore from the same State, comparatively late, with reputations won, and quickly mounting higher here.

George A. Johnson, who came to us from Indiana, was born in Maryland in 1829. He attended an academy at Saulsbury, in the last-named State, and at nineteen entered Yale College, graduating therefrom in 1853. In his class were A. D. White, who in recent years was U. S. Minister to Germany, Wayne McVeagh, who became Attorney-General of the United States, and Edmund Clarence Steadman, the poet. He took two prizes in his first year at Yale, for best compositions in English. In the senior year he was awarded, for an essay, the Townsend prize, and was elected one of the editors of the Yale Literary Magazine, and was made chairman of the editorial board. He contested with White, but unsuccessfully, for the highest honor, the "De Forest Gold Medal."

After his graduation from Yale, Mr. Johnson was offered and accepted the chair of Latin and Greek in the Western Military Institute of Kentucky. In less than a year he resigned this position and went to Newcastle, Indiana. He had removed thither from his native place before going to Yale, and had qualified himself for the bar under Judge Elliott of the Indiana Supreme

Court, and by a course in the law department of the State University. He had been admitted to practice, and it was to acquire a classical education that he went to Yale before entering on the legal profession. Now, again settled at Newcastle, he began the practice. In the year 1855, after a protracted visit to Baltimore, where he married, he returned to Indiana and resumed practice at Cambridge City. During his residence there he served as president of the city Board of Trustees for two terms. In 1867 he delivered the annual address before the two literary societies of the Indiana State University. In that year he became, by appointment of Gov. Hendricks, judge of the Seventeenth Circuit Court, his district embracing several counties. For two years he was senior warden of the Grand Commandery, Knights Templar, of Indiana.

Gen. Johnson removed with his family to California in 1874, and located at Santa Rosa, Sonoma county. He there practiced law in partnership with Hon. Barclay Henley until 1879. In 1878 he was elected mayor of Santa Rosa. He was a member of the State Constitutional Convention of 1878. His skilful handiwork runs all through the instrument contrived and put together by that body, and which was adopted by the people in 1879. The official report of the proceedings of the convention show that he took a full part in the debates, and that his remarks were always timely and characterized by sound judgment. He addressed the convention on the interesting question of the eligibility of Judge Eugene Fawcett, (who was a district judge at the time he was elected a delegate), and voted with Hoge, Wilson, Winans, and the majority, in favor of the resolution declaring Judge Fawcett entitled to his seat in the convention. He also discoursed elaborately on every other grave question that engaged the convention, on the pardoning power, trial by jury, the liability of directors of corporations, the railroad commission, Chinese immigration, revenue and taxation, public education, and a multitude of subjects of less importance. He was selected by his fellow members to be their spokesman in the presentation to the president, Hon. J. P. Hoge, of one hundred standard literary works. His happy address on the occasion, just as the convention was about to finally adjourn, as well as Judge Hoge's response, will be reproduced at the end of this chapter.

In 1880 Gen. Johnson was unanimously nominated by the Workingmen's party for the Supreme bench, but declined. His indorsement by that party was in consequence of his strong anti-monopoly stand in the Constitutional convention, in which he voted for the anti-Chinese article and the eight-hour system on public works. In 1882 he was elected State Senator from Sonoma county over William Hill, president of the Sonoma county bank, and was re-elected in 1884.

Gen. Johnson was elected Attorney-General in the fall of 1886, as a Democrat, when there was a drawn battle between the Democrats and Re-

publicans, a portion of each political ticket being chosen. Probably no officer in the long and strong array of his predecessors discharged the trust with a loftier sense of duty, a more indefatigable industry, or sturdier powers of mind. When he became Attorney-General, he found several cases pending in the Supreme Court of the United States, on writs of error to the Circuit Court for this district, involving taxes levied on the different railroads for the years 1883 and 1885. The Circuit Court had rendered judgments in favor of the railroads, hence the writs of error sued out by the people. Finding that the judgments in the same court against the State, in suits for the recovery of similar taxes for the year 1884, had not been appealed, Gen. Johnson sued out a writ of error in one of these cases, stipulating with the opposite counsel that the judgment in this case should be decisive of the other cases for that year. Inasmuch as the questions involved were vital questions, greatly affecting the finance of the State, and in which a very general interest was taken, he made an application to the court to have the cases advanced on the calendar, and although this application was opposed by the railroad people, it was successful, and the cases were set down for hearing in the Supreme Court for January 9, 1888.

Had these cases not been advanced, they could not have been reached on regular call until two years later or thereabout. All of these cases had been tried, and the findings of fact and law settled, in the Circuit Court, long before the commencement of the General's term of office.

He had hoped that the cases were in such a condition that the great federal questions, whether or not the railroads were allowed due process of law, in respect to an opportunity to be heard as to the assessments, and whether or not the classification of railroad property for the purposes of assessment and taxation, without a deduction of their mortgages, was constitutional, could be definitely and finally settled. He accordingly went on to Washington in December, 1887, and in connection with Messrs. Shellabarger & Wilson, argued the cases on behalf of the people, while George F. Edmunds, W. M. Evarts, and Creed Haymond spoke on behalf of the railroads—the argument occupying four hours on each side.

The court decided in effect, that the findings in some of the cases included steamers and fences in the assessment, and in other cases included certain federal franchises which could not be assessed. They held, therefore, that the assessments were void.

Gen. Johnson reported to the Governor that he was assured by some of the State officers who had this matter of assessment in charge, that the findings in the respective cases did not express the facts, but, as the findings of the lower court were conclusive, he could not get a decision on the paramount federal questions above referred to, and the judgments of affirmance were based on minor issues. There was great negligence, he said, by some

one in respect to these findings, and the people were handicapped by records thus gotten up long before he came into office.

Gen. Johnson's latest appearance before the United States Supreme Court at Washington, was in the Spring of 1889, and the occasion was the argument of the noted case of the Chinaman, Chae Chan Ping, vs. The United States. The question involved was one of overshadowing importance to this State, and excited universal interest, being the constitutionality of the Chinese Exclusion Act, passed by Congress October 1, 1888. The State of California, by act of the legislature, employed Hon. John F. Swift and Hon. Stephen M. White to assist Gen. Johnson in presenting the popular side of the question to the court of last resort. That tribunal declared the Exclusion Act constitutional, and the three gentlemen just named are entitled to equal credit for the result.

Gen. Johnson holds a place among our most effective debaters and public speakers. He has addressed the public frequently at agricultural fairs, Masonic anniversary meetings, and independence day celebrations..

This personal view of the attorney-general was taken by a press reporter during the sitting of the Constitutional Convention, in November, 1878:

There is much vitality in his face and manner. He is about six feet in height, and muscular. A well arranged iron gray mustache ornaments an otherwise cleanly shaven face, and a good head of iron gray hair crowns a large and intellectual looking head. He dresses neatly, his toilet is never neglected even in the smallest matters, refinement is stamped upon the entire man. There is an air of absolute precision about him, that borders upon stiffness. He is always courtly but never familiar. A certain severity of manner warns off the intruder, and gives the appearance of isolation. He has a splendid side face for a medallion. He seems to be free from heat and passion—his warmth is wholly mental. The structure of his mind is orderly, calm and precise. His early culture was in the classics, and his mind has been thoroughly polished by that instrumentality. His mind is fully stored with the imagery and phraseology of the Greek and Latin classics.

Every sentence gives evidence of his familiarity with those authors, and is rich in half concealed metaphors. He is free in the use of illustrations from that source. Even his legal learning bears the classic polish. The Greeks and Romans have impressed his mind more deeply than modern thinkers. But this remark applies more to the form of his speeches than to their matter. His appearance, his self-contained manner, the impartial tone of his mind, have won for him the confidence of the convention.

I will conclude this chapter with Gen. Johnson's presentation address to President Hoge of the Constitutional Convention, to which reference has been made. The General said:

MR. PRESIDENT:—I am commissioned by my *fraters*, on the floor of this Convention, to rise to a question of privilege. It is a matter, sir, which concerns vitally the feelings of this body, and as they believe, and so I believe, yourself as the President. In its retrospect it dates back to the organization of this Convention. In its prospect it reaches forward to the approaching close of our labors, when we shall bid a long adieu

to this hall and return to our respective homes. Five months and more have passed away since we came to these halls comparative strangers. Here was the young man, just from College, crowned with the fragrant benedictions of Alma Mater; the matured lawyer, the victor of many forensic triumphs, fresh from his briefs; the old statesman, still well preserved and displaying all the fire, vivacity, and intellectual acumen, of which we have heard our seniors speak aforesometimes. There were others representing other professions, other pursuits, and the dignity of labor.

In that motly group there came also one, the observed of all observers, "frisking beneath the burdens of three-score," and in his hands we placed the gavel of command. To govern such a heterogeneous body, to assuage their turbulence, to direct aright their efforts and aspirations, required a man of clear head, great intellect, and moral resources, a strong will, and I might add, an unimpaired physical constitution. We have found you, sir, equal to the emergency. During the prevalence of the stormy debate, you have preserved your own equanimity of mind and of temper. However complicated the questions which have arisen, your thorough knowledge of parliamentary law, and your long experience in presiding over deliberative bodies, have served you as the thread of Ariadne served Theseus, as a means of escape from the labyrinth. Your conservative demeanor, and gentle courtesies have also inspired us with the most friendly sentiments. Let these mute but learned witnesses by my side, attest the genuineness of this expression. Here is Dickens with his touching pathos, and effervescing humor, as he tells of some new variety which he has just discovered in the genus homo. It may be some quaint original like "Little Paul Dombey," some quainter still, like "Jack Bunsby," or "Captain Cuttle," or some immaculate conception like "Agnes." Here is Motley, who discourses learnedly about a half submerged country where William the Silent laid the foundation of a great State. Here is our own Irving, never so entertaining, as when, with face all aglow, he talks about the legends of Sleepy Hollow, and the weird country of the Catskills. Here is De Quincy, the learned opium eater, who can discount the heathen Chinese himself in opium eating, or at least, he can describe its effects in words of more thundering sound; and here is that brilliant essayist, Montaigne, who has laid all history and personal observations under contribution to "point a moral or to adorn a tale." Here is Macaulay, who deems it not beneath the dignity of his pen to portray the changing manners and customs of a great people, in his history of England; and finally here, in order, Sheridan, whose oration on the charge against Hastings, extracted from Fox that famous eulogy: "All that I have ever heard, all that I have ever read, when compared with it, dwindled into nothing and vanished like vapor before the sun."

These learned witnesses, Mr. President, be pleased to take home with you, and knowing your eminently social turn of mind, we have no doubt you will give them a warm reception, and ensconce them in your best apartments. The shapes they assume are somewhat Protean, being an even hundred in number. So many guests at one time would ordinarily occasion some disarrangement of a household; but your record for hospitality we have never heard questioned. Laying aside all facetiousness, Mr. President, I will make my meaning more apparent, which is, that your friends in this Convention have requested me to present you, in their name and for them, one hundred volumes of standard literary works as a slight testimonial of their respect and regard. The arch to Titus, the column to Trojan; but the works of Dickens, and Motly, and Irving, and DeQuincy, and Montaigne, and Macaulay, and Sheridan, to Mr. President. [Applause.]

We came together, many of us at least, as I said before, as strangers; I might have added, with preconceived antagonistic notions. After the constant attrition to which

our views have been subjected for the last five months, I doubt not here at this late day we entertain more respect for one another, and have abated some of the overweening confidence which we had in our formulas, and in our own peculiar opinions, as constituting the only safety of the State.

The State! What shall I say of her—this beautiful land of the Occident? Long after we shall have passed away; and nothing shall remain of us but

The broken arch, the ruined wall,
The chambers desolate, the portals foul,

May our goodly mother, the State, survive and flourish. [Applause.] Her fresh young face was beautiful three hundred years ago, when the white sails of Drake fluttered in San Francisco Bay; still later, it retained its beauty during the gentle sway of the Mission Fathers, with their depasturing flocks; despite the Mongolian blotch it is beautiful now, with the changing colors of the orange, the grape, the olive, the waving cereals, and with the cultivated look of her proud metropolis. But it will be more beautiful when, by the adoption of the new Constitution and its practical workings, labor shall be required for all its pains, and from her otherwise fair features shall gradually disappear the Mongolian blotch. Then, and only then, will her beautiful face become the mirror, as it were, of a free, happy, homogenous, and assimilating people.

But the shadows are lengthening. The gavel will soon be unheeded; the hand which now holds it will soon hold it no more; and after the uttering of a word my mission will have been accomplished. That word has been said time and again, by all classes and conditions of society. It was whispered it may be many years ago by some one on this floor, into the ear of some gentler being, some fond parent, some trusted monitor, the bulwark of his youth. It is a word which will be uttered by us many times to come, to wife, to child, father, mother, friend, but always in sorrow; a word which dissolving nature, before it breathes its last, will rally all of its energies to articulate; but all must say it, and all must feel it. That word is, Farewell!

For who, to dumb forgetfulness a prey,
This pleasing anxious being e'er resigned,
Left the warm precincts of the cheerful day,
Nor cast one longing, lingering look behind?

MR. PRESIDENT:—I have nothing farther to say on this question of privilege. "Finiis" is written on the parchment roll which contains the new Constitution; that word which has been said so often and by so many in this changing kaleidoscopic life of ours; that word which is destined to intensify the bitter sorrow of so many hearts in time to come, whether they beat in the breasts of prince or peasant, the learned or the unlearned, must now be said by the Delegates of this Convention. My *fraters* say, I say, we all say, FAREWELL TO MR. PRESIDENT. [Applause.]

President Hoge responded as follows:—Mr. Chairman:—I return to you, and the gentlemen you represent, my most grateful thanks for the kind and flattering terms in which you have caused this gift to be presented to me. It overpowers me. Mr. Chairman, I hope you will believe me when I say I am essentially a modest man. [Laughter.] The terms in which you have presented this very elegant, and to me, most appropriate gift, almost destroys the power of reply. I have endeavored, in the position in which this Convention in its kindness placed me, to perform its duties faithfully, impartially; and with the honest purpose of advancing the deliberations of this body and conducting them to a successful termination. If, therefore, in the exercise of those duties, I have succeeded in winning your appropriation, I am well rewarded. I shall treasure this beautiful gift for all time. Every time I look into its pages it will

bring back pleasant memories of hours that we spent together here; and when I am gone they will be handed down to my children, to remind them, in after years, that their father had merited your kind consideration and approbation. Gentlemen, we are now about to part, many of us, perhaps, to meet no more; I beg, therefore, that you will hold me in kind remembrance, and I assure you that I shall hold you all in pleasant memory. I wish you a happy return to your homes and a prosperous future. [Continued applause.]

CHAPTER XXXVI.

A Look Northward—Thomas L. Carothers of Mendocino, and Clay W. Taylor of Shasta—Men who Tower above their Fellows—District Attorneys of their Counties—Boyhood on the Farm and in the Mines—Busy Lives at the Bar—Personal and Political Data—M. M. Estee's Tribute to Mr. Carothers—Dr. Shorb's Address in nominating Mr. Taylor for Governor.

In referring to Mr. Carothers, in a recent conversation, Hon. M. M. Estee said to me: "I have known him ever since he had whiskers. He is an earnest, active, honest man; a good lawyer, has confined himself almost exclusively to his profession; has the confidence of all those who know him, and he deserves that confidence. He studied law in my office and was as industrious and worthy a law student as he has since become conspicuous as an attorney. I cannot speak too kindly of him."

Mr. Carothers is one of that noble band of young men who went forth to fame and fortune from the old Sacramento High School, and whose successes have frequently challenged attention in this volume. I knew his manly character when it was forming. I saw him sowing, and although widely separated from him before he began to reap, I know he has a good title to his harvested stores. Ambitious, generous, enthusiastic, he was yet a persevering student, and controlled always by strong common sense. It was by assiduous effort that he qualified himself for the enlarged sphere which he began to adorn now a good many years ago. It only excites gratification in the breasts of his old-time fellows to see him now first in the hearts of the people of his county and leading the local bar.

Thomas Langley Carothers is the son of James H. and Margaret Barnes Carothers, and was born at Carthage, Hancock County, Illinois, September 26, 1842. He "crossed the plains" with his father's family in the spring of 1853. His father settled at Stony Point, Sonoma County, in the fall of that year, remaining there until 1857. Thomas in the meantime attended the neighborhood school and worked on his father's farm. In 1857 the family moved into Petaluma, where they resided until the spring of 1859, Thomas attending the public schools of that place. In the spring of 1859 the family moved to Sacramento City, where Thomas continued his studies in the public schools until the fall of 1861. At the close of the regular term of the High School of Sacramento, in September of that year, the young man entered the law office of Harrison & Estee, of that city. He studied law until January, 1862, when the family returned to Petaluma on account of the great flood then at Sacramento. On arriving at Petaluma our law student entered the office of Hon. Geo. Pearce, where he continued his studies until October 5th,

1863. He was then admitted to the bar by the Supreme Court of the State, having become of age only ten days before.

Mr. Carothers began the practice of law in Petaluma. He filled the position of Deputy District Attorney of Sonoma County, for two years, under Hon. William Ross. In May, 1866, he removed to Ukiah City, Mendocino County, where he has practiced his profession ever since. In December, 1866, he was married to Miss Lucy Pierson, daughter of the late Dr. E. M. and Harriet Pierson. Since his admission to the Supreme Court, he has been admitted as an attorney of the U. S. Circuit Court and District Courts at San Francisco. In 1867 he was appointed a notary public by Governor Low, which position he has held ever since. He has been District Attorney of Mendocino County for two years, and has been for several years a U. S. Commissioner.

In 1884 Mr. Carothers was the nominee of the Republican party for Congress in the 1st Congressional District of this State. The district had been giving about two thousand Democratic majority and yet he came within one hundred and forty-five votes of election, his Democratic competitor being Hon. Barclay Henley. In 1888 he was one of the Republican nominees for Presidential Elector for the State of California, and Gen. Harrison carrying the State, Mr. Carothers was elected and discharged the duties of the position. He had been a trustee of Ukiah City for ten years, since its incorporation, and during all that time President of the Board of Trustees. For several years he was the law partner of the Hon. R. McGarvey, now Superior Judge. He has acquired a large and lucrative law practice; and, particularly as a criminal lawyer, he has won great reputation. In 1880 he was employed by the county to assist in the prosecution of the famous "Mendocino Outlaws," and he convicted every one of them.

The Honorable Superior Judge of Monterey County (who is noticed in Chapter XVII) in a pleasant conversation in March, 1889, informed me that when he held court for the Superior Judge of Mendocino several years before, he found Mr. Carothers even then employed on one side or the other of every case of any importance; that he was the legal adviser of the bank, the railroad company, and all the influential business men of his county and all the corporations.

"In his prosperous practice," says an editorial writer, "he has made a large connection, that extends beyond the county's limits; his excellent reputation as a lawyer and an honorable citizen has gone farther. His splendid offices contain as complete and as handsome a library as can be found in any town. His pretty residence on Main street is a gem of cottage architecture. In his happy home, surrounded by a loving family, Mr. Carothers finds the contentment and peace which are the reward of the honest and upright endeavors of his life."

CLAY WEBSTER TAYLOR is a name that would seem to antagonize the politics of the distinguished man who so honorably bears it. Not only Taylor but he is Clay Taylor, and more, Clay Webster Taylor. His father, one of the early settlers of Michigan, was a warm admirer of the three great Whig leaders whose names meet in his Democratic son. The latter has, too, a commanding form, and it looms up at the foot of Mt. Shasta, towering above all other men of that region as Shasta overtops other natural heights.

(I do not forget that Mount Whitney, near the southern extremity of the Sierra, rises above the sea-level five hundred feet higher than Shasta; but John Muir has shown that the individual stature of Shasta is far loftier than that of Whitney, as Shasta lifts up from a base only 4,000 feet high, while Whitney's base is 11,000 feet above the sea. The circumference of Shasta, too, around the base, says Muir, is nearly seventy miles, while that of Whitney is less than five. Whitney is almost snowless during the summer months, while Shasta presents the picture of "perpetual snow.")

Mr. Taylor was born in the town of Howell, the county seat of Livingston county, Michigan, September 10, 1844, making him a few months younger than D. M. Delmas, and one of the youngest of our strong men of the bar. The father was a physician, and came to California to heal himself rather than others, his health failing. He first lived at Sacramento, in 1858, and the son, then fourteen, obtained employment as a clerk. The latter soon went to work on a farm, from which, after a year, he turned to mining at Nevada City, where his parents joined him again. A portion of his stay at that place was passed at a clerk's desk. In 1861, the young man went over the mountains "with the tide," into the then territory of Nevada, and worked as a miner on the Comstock lode at Virginia City and Gold Hill. He also labored in the timber regions of Washoe.

In 1864, when twenty years old, he determined to acquire further education, and so went to Oakland, California, and for a year diligently pursued his studies in school. The next year his father died, and the student, just arrived at age, was busied for some time in settling the estate. That accomplished, and having in the meantime married, he removed to Shasta, where he qualified himself for the bar, was admitted, and quickly attained the leading practice which he has ever since held. He has served the people of Shasta county as district attorney for eleven years, and as State Senator for the term 1882 to 1886. He was admitted to the bar of the State Supreme Court in 1879, and to that of the Supreme Court of the United States in 1885. In the sphere of the fraternal orders Mr. Taylor has made a very wide acquaintance and won universal good will. He has served two terms as Most Worshipful Grand Master of Free and Accepted Masons. He is of the thirty-third degree, Scottish Rite, and a Knight Templar.

In the Ancient Order of United Workmen he has been Grand Master and also a representative to the Supreme Lodge. Being a member of the Grand Lodge of the last named Order when he presided and when he was chosen Supreme Representative, I am able to testify to the dignity and ability which he brought to the executive office.

At the Democratic State Convention, at San Jose, in 1882, Mr. Taylor was among the party leaders named in connection with the office of Governor. Gen. Stoneman carried off the prize, owing to his record as a member of the State Railroad Commission, but Mr. Taylor had a large and enthusiastic following. He was placed in nomination by Dr. J. Campbell Shorb, of San Francisco. Dr. Shorb is a graceful and happy speaker, and I think it well to give his remarks on this occasion as well as the speech of Mr. Taylor. Dr. Shorb said:

I rise with heartfelt pleasure, as pure as I have ever experienced in my political life, with unshaken loyalty to the interests and the welfare of the Democratic party, a deep solicitude for its vital necessities, to place in nomination for Governor of the State of California, Clay Webster Taylor of Shasta. Mr. Chairman, I love California with all my heart and all my soul. I reached her shore many years ago, when still a boy, and from that hour to the present moment she has been a mother to me. I feel for her a love, a kindly interest, a bond of sympathy. She has buried in oblivion all my sins and transgressions. The little merit she has found in me she has exalted a thousand fold, and she has filled the first portion of my life wherein appreciation of natural pleasures were in blossom, with peace and happiness and prosperity. Were I to tell a man east of the Rocky Mountains my love for California he would say it was affectation or hypocrisy. Sometimes I feel assured that when the Lord Almighty created the universe and looked around and said it was very good, he resolved on a new piece of creation and made California. I wish her, from my heart, all peace and honor, glory, and prosperity. I want the intellect and honor and integrity of her men to ring through the boundaries of civilization. I want the purity and beauty and wit of her women to be the theme and dream and inspiration of the future poet and historian. I want her government quoted as a model of excellence throughout the boundaries of this Republic. I want her governors, her legislators, her judges, her senators, and her representatives not only to be the peers of all American officers, but quoted as models of valor, intellect, and wisdom. Thus loving California I want to see her Governor a man whose courage, whose intellect and integrity give the promise of his bright and fortunate future as the destiny of California itself. A natural born leader of men. A natural tribune of the people, and one who will become its idol when, in the course of time, they find that ambition cannot reach, aggregated wealth frighten, or gold soil the hand at the helm of State. Before the Lord I feel I present such a character in the person of Clay Webster Taylor. Why, Mr. Chairman, as I pronounce those names—Clay, Webster, Taylor—what a panorama of history presents itself! When the story of valor, chivalry, patriotism and genius is told in the university of the future, it shall echo and ring with the name and genius of Clay; and when the historian writes of the dangers surrounding the infancy of this Republic, that threatened the disruption of this empire, this glorious empire of free and co-equal States, how brilliant in the somber twilight of the past will glow the giant form of Webster, whose matchless words, still ringing fresh in our ears, "Liberty and Union now and forever, one and inseparable," are as fresh to us to-day as when they fell like

molten lava on the ears of senators of the United States. And when we come to Taylor, what man who has an atom of love for California in his heart will not reverence that name borne by the grand old hero of Louisiana and the Mexican war—the hero of Palo Alto, who opened the halls of the Montezumas, threw down the walls of the City of Mexico, and gave us California. God bless her, the sweetest, ripest, happiest Commonwealth ever seen by humanity since Adam and Eve, hand in hand, walked out of the Garden of Paradise under the curse of Almighty God. We give you then, Clay, Webster, Taylor, who sprang from the people, who belongs to the people. Let us give him back to them. We can give them no better man. He is their ideal, their champion, their offspring, and before God, Mr. Chairman, I do not believe the people will repudiate him.

Dr. J. B. Briceland, of Shasta, seconded the nomination of Mr. Taylor, and then Mr. Taylor was called for by a multitude of voices from the floor of the convention and from the galleries. He appeared on the platform and was loudly cheered throughout a speech of some length.

Mr. Taylor is perhaps the farthest removed of my subjects from the metropolis of the State. The following close view of him is from the *Red Bluff Evening Sentinel*. It is editorial.

Senator Clay W. Taylor of Shasta is one of our remarkable men. He is nearly six feet in height, broad-chested, with a massive head and a floating brown beard. He possesses a voice of wonderful compass and power, but though a fluent as well as a forcible speaker, talks comparatively little. He is a great listener, however, and never loses the thread of an argument on any important subject. He seldom speaks more than once in any debate, and is consequently listened to with interest when he voices the cause of popular legislation. Senator Taylor is consistent and earnest. He is naturally cautious and logical, not hasty in forming conclusions, or radical in his views, but firm in his convictions once made, and unswerving in the execution of his purposes. He is a valuable acquisition to any cause by reason of his cool judgment and calm confidence, that finds play when the enthusiasm of more sanguine supporters has begun to evaporate. Mr. Taylor has been classed by some journals as "conservative," but he acted through the legislative session with the extreme anti-monopolists. Whenever he differed with them it was in deference to the views of his constituents or through his own honest conviction that he was acting for the best interests of his party and the public.

The same paper, in an extended notice of the trial of the case of *Barkley vs. Copeland*, said:

We were there ourselves and know whereof we speak and cannot let this opportunity pass to say that we have never witnessed in the State the exhibition of better forensic talent and eloquence than that displayed by Hon. Clay W. Taylor in his closing argument for plaintiff. We cheerfully concede that our measure of the orator had not been commensurate with his deserts, and we take pleasure in saying that Mr. Taylor has no superior and but few equals as a lawyer and orator in this State. If true merit, profound legal knowledge, strict fidelity to the interests of his clients, and brilliancy as an orator are stepping stones to fame we bespeak for him a future of eminence and celebrity.

CHAPTER XXXVII.

Lewis D. McKisick—A Bar Leader in Tennessee—On the Bench in that State—Removal to California and location at San Jose—Permanent Settlement at San Francisco—Associate Counsel of the Southern Pacific Company—Connection with Important Causes—The Great Case of Colton vs. Stanford.

Lewis D. McKisick has a long American lineage. His grandfather, Daniel McKisick, served with distinction throughout the Revolutionary war as a captain in the North Carolina line, and afterwards represented in the senate and assembly of that State the great county of Lincoln, down to 1799. In the year 1800 he removed with his family and settled in what is now Bedford County, Tennessee, then the heart of the Indian country. Doctor Wilson H. McKisick, the father of Lewis D., settled in Henderson county, Tennessee, in 1828, where his son, our subject, was born March 7, 1829. The latter's mother having died in 1836, he was sent with a younger brother to reside with his maternal grandparents in Alabama. In 1841, they returned to Henderson county, Tenn., and entered the academy at Lexington. After remaining there less than a year, Lewis D. went to the country and worked on a farm for some years, going to school when he could. He ended his school studies at the Lexington Academy in 1850. In the following year he was elected by the trustees principal of that school, which he conducted for one year, devoting all his spare time to the study of the law. In 1852 he entered the office of Hon. Return J. Meigs, a distinguished lawyer of Nashville, Tennessee, with whom he remained a year. In 1853 he attended a term of the law school of Cumberland University at Lebanon, Tennessee, the most celebrated law school then in the south. At the end of the term he passed a successful examination before judges R. S. Caruthers of the State Supreme Court, B. S. Ridley, one of the chancellors, and Nathaniel Baxter, one of the Circuit judges. He first opened an office at Lexington, in his native county. In the spring of 1854 he was admitted to the bar of the Supreme Court of the State at Jackson. He remained at Lexington for about two years, and then removed to Paris, Henry county, Tennessee, and from that place he went to Memphis about the first of November, 1857, where he continued to reside, engaged in practice until his removal to California in 1879.

Judge McKisick's early practice at Memphis was in partnership with his brother-in-law, Mr. C. H. Williams. The firm of Williams and McKisick, though composed of young men, soon attained an enviable position at the

Memphis bar. It continued to grow in reputation and business until the breaking out of the war, when both of its members entered the Confederate service. Col. Williams was killed at the head of his regiment at the battle of Shiloh. Mr. McKisick returned to Memphis after the cessation of hostilities, and immediately resumed the practice of his profession in connection with Judge Archibald Wright, then but recently retired from the Supreme Bench of Tennessee. The firm of Wright & McKisick lasted about four years, and was second to none in that State. Afterwards Mr. McKisick was associated for several years with Mr. Thomas B. Turley, and they, later, with the Hon. Isham G. Harris, since one of the U. S. senators from Tennessee.

In 1875 the legislature of Tennessee created a Court of Arbitration or Commission of Appeals, to consist of three judges to aid the Supreme Court in disposing of the large mass of civil business which had accumulated on its docket. The first knowledge which Judge McKisick had that his name had been mentioned to the Governor, Honorable James D. Porter, in connection with this tribunal, was the information that he had been appointed one of the members of the court. In 1877 the legislature re-created the court, to continue for two years, and Judge McKisick was again appointed, and was by his associates elected Chief Justice, which position he filled during the existence of the court. The business of the Supreme Court being still behind, the legislature again, in 1879, passed an act re-creating the court. An appointment was again tendered to the Judge by Governor Marks, which was, however, declined. The Governor shortly afterwards sent to him, which he accepted, a commission as special judge of the Supreme Court, to hear causes in which one of the regular judges of the court was incompetent.

In July, 1879, the yellow fever became epidemic in Memphis for the fourth time during the Judge's residence in that city. Satisfied that Memphis is within the yellow fever zone, and that it would always be subject to visitations of that scourge, he promptly took his family to the mountains of East Tennessee, and came himself to California with a view to a permanent settlement here. Returning for his family in October of that year, he took up his residence at San Jose. It was while on a visit to that place in 1882 that my attention was called to him by old lawyers as one who had already established himself in a leading place at that bar, and won general confidence and esteem.

When I had determined to incorporate a notice of Judge McKisick in this work, I wrote to his old friend, Mr. T. B. Turley, of Memphis, asking him to send me data, with his own observations on the subject. Mr. Turley, who is a lawyer of great distinction, responded promptly and favorably, and to him and Mr. Henry Craft, another lawyer of Memphis whom Mr. Turley called to his aid, I am chiefly indebted for the material for this chapter.

It appears that until his removal to California, in 1879, Judge McKisick easily held first place at the Tennessee bar. He had for years been impressed with the advantages of California. He had been a close student of its history and had thoroughly familiarized himself with its climate, products, and resources. It was hard for his friends to realize that his knowledge of the Golden State had not been acquired by actual observation, so accurate and correct was it in every respect. After the terrible epidemics which scourged Memphis and so many other places in the south during the years 1878 and 1879, he concluded to remove from Tennessee and become a citizen of California.

Although a man of decided force of character and pronounced opinions on all public questions, his tastes were opposed to anything like a public life. Hence he never sought office, and took but little active part in politics. He might easily have gained almost any political position in the gift of his fellow citizens in Tennessee, but he always felt a repugnance to seeking the suffrage of the people. Judge McKisick's resolve to remove from Tennessee permanently was generally received throughout that State as a piece of bad news, and called forth expressions of regret from men in the highest places.

Hon. James O. Pierce, Judge of the State Circuit Court at Memphis, was then sojourning in Wisconsin, to avoid the yellow fever. He had been an officer in the United States Army during the war. He now wrote to Judge McKisick as follows :

I receive with regret the unexpected intelligence that you are about to make your home at San Jose, California, because your removal from Memphis breaks in so seriously upon professional associations that have been to me so very pleasant. Personally, our acquaintance has been in so many ways more than agreeable during the several years that I have practiced law at Memphis, and the few during which I have been upon the bench, that, though, we met as strangers, I am sure we part as friends.

Permit me to say, also, that your professional brethren will one and all feel keenly the loss of one of your high legal accomplishments and exalted views of professional honor, and it will be only because they are, like myself, banished temporarily, that you do not carry with you the collective expression of their esteem. In the hope that you may very speedily find yourself established in pleasant professional and social relations with those among whom you now cast your lot, I beg to remain very sincerely your friend.

Hon. John Baxter, Judge of the United States Circuit Court for the Sixth circuit, at Nashville, under date of October 22, 1879, wrote :

It gives me pleasure to say that I have known Hon. L. D. McKisick for the past seventeen years, and that during all that time he has been recognized as a gentleman of pure and unblemished character, and a lawyer of high professional attainments. As a citizen, lawyer and judge he has always acquitted himself with credit, and he carries with him to his new home the friendship and confidence of a large circle of acquaintances left behind.

Hon. W. W. McDowell wrote thus to Judge McKisick :

I have just learned that you are about to remove to California. On my own account as well as that of the State of Tennessee, I deeply regret the decision which you have made. I know of no lawyer whose departure would occasion a greater loss to the State or the profession. And in saying this I only express the universal sentiment of the Memphis bar and judiciary. Since I went on the chancery bench of the city of Memphis I have witnessed with pleasure the fact that you have not only been foremost in maintaining a high professional standard, but have also presented the causes of your clients with as much ability as any solicitor of my courts. And I am fully confident that your prompt business habits, extraordinary memory, and great ability, will achieve success wherever you may go—and I assure you that you have my best wishes for your prosperity in your new home.

Hon. E. S. Hammond, United States District Judge for the Western District, at Nashville, wrote, Oct. 4, 1879 :

The determination of Judge L. D. McKisick to leave Memphis has created such a profound regret among our people, that we yet hope he may reconsider the matter and remain with us. If he goes to California or elsewhere, it occurs to me that it may be pleasant to my brethren of the bench and the profession to know in the beginning what they would soon find for themselves, that he is one of the foremost lawyers of Tennessee, and equal to the very best anywhere. He has been several times, with universal satisfaction, selected to preside in the Supreme Court Commission, provided to aid that court in clearing its docket, and could at any time have had a place in that court itself, if he had so desired, as the result of a general belief in the profession that he is pre-eminently qualified for it. His social qualities endear him to all. It is painful to part with him. Of my own motion I commend him to the confidence of the courts before which he may appear.

This next tribute came from the eastern confines of the State, a point farthest removed from Judge McKisick's home.

Supreme Court Room, Knoxville, Tennessee, Oct. 5, 1879.

Learning that our brother Judge L. D. McKisick of the city of Memphis, is about to remove to California and engage in the practice of his profession, we take pleasure in commending him to the confidence and courtesies of the profession, as a lawyer of large learning and ability, and a gentleman of unspotted honor. He has long ranked among the best lawyers in our State, and is well entitled to his place. We give him our cordial endorsement to the profession of the State to which he is about to remove.

Jas. W. Deaderick, Chief Justice; Thos. J. Freeman, Justice; P. Turney, Justice; R. McFarland, W. F. Cooper.

Hon. Albert S. Marks, at the time Governor of Tennessee, embraced the occasion to draw up with his own hand and sign this testimonial, which he addressed, "To the Bench and Bar of California." It is dated, Nashville, Oct. 15, 1879.

The Hon. L. D. McKisick is abandoning the first place at the bar in the chief city of Tennessee for a permanent residence in California. He enjoys the reputation of being one of the best lawyers in this State, and I can give no better evidence of my concurrence in the popular estimate of him than to say that, when a provisional court of last resort was established during my administration, I tendered him a place upon it which he declined. As a gentleman, his character is above reproach, and his long and suc-

cessful professional career is without a stain. Upright, courageous and generous, he leaves behind him troops of friends. Tennessee could not lose, nor California gain, a better man or abler lawyer.

Although, like Judge Works and Attorney General Johnson, Judge McKisick came comparatively late to California, he yet, like them, soon found that in removing here he had taken the most judicious step of his life. After a few years' practice at San Jose he removed to San Francisco, and accepted an invitation to become one of the regular counsel of the great railroad corporation. He has since been connected with several causes of the largest magnitude in the interests involved. Some of these have been in the line of his regular employment by the railroad company, while others have been entirely independent of the same. Of this latter class were the settlement of the two million dollars estate of Charles McLaughlin, who was killed by J. B. Cox, and the suit known as the "Mare Island Case." This last was entitled "D. W. Bouldin and another vs. Thomas S. Phelps, defending for the United States," and was an action of ejectment, commenced in the Superior Court of Solano County in the year 1881, to recover Mare Island, on which is located the United States Navy Yard. On the application of the defendant who was the commandant at the Navy Yard, the cause was removed to the U. S. Circuit at San Francisco. The defense was the statute of limitations.

The title of the government to Mare Island as set up by the defense in this case begins with a grant of the Island to Victor Castro by Juan B. Alvarado, then Mexican Governor of California, dated May 20, 1841, and runs through mesne conveyances from Castro to Bissell and Aspinwall, who had the original grant confirmed by the land commission created by Act of Congress of 1851, and who thereafter, in 1853, conveyed to the United States. The plaintiffs in this suit also claimed through mesne conveyances from Victor Castro. They alleged that when the United States, by their agents and officers, went on to Mare Island they found the Island in the open, notorious and exclusive possession of the plaintiffs' grantors. Judge McKisick's closing argument in this case was one of the most interesting and ingenious, as well as one of the most elaborate ever presented to one of our courts.

He urged that when the United States purchased in 1853 they knew, or had been put upon inquiry to ascertain, that Castro had sold to William Bryant in 1844, Bryant to Major Stephen Cooper in 1848, and Cooper in 1850 to plaintiffs' grantors, and, that being done, he invoked the doctrine of estoppel by notice, and the doctrine of *res judicata* and of estoppel by deed, to the only title which the United States had shown. He laid stress on the fact that the government, in taking its deed from Bissell and Aspinwall, had required of them a penal bond, with sureties in the sum of \$200,000, to hold the United States harmless against the claims of all persons claiming adversely under Victor Castro.

But the plaintiffs lost this case in the Circuit Court, and concluded not to appeal. The facts in controversy were so interesting, and the property value involved so incalculable that the trial was watched from all parts of the country, and from many places came requests for copies of Judge McKisick's argument.

In the two other cases to be noticed, Judge McKisick represented his colossal client, the railroad corporation.

In November, 1880, Charles Main and others commenced an equity suit in the Superior Court of San Francisco, against the California Pacific R. R. Company, the Central Pacific R. R. Company, Leland Stanford, C. P. Huntington, Charles Crocker, James B. Haggin, and the widow of Mark Hopkins; the complaint alleged a series of fraudulent acts on the part of the defendants affecting the property, earnings and general welfare of the railroad company first named, to advance their own interests at the expense of the corporation, and to defraud the other stockholders. An accounting was prayed for.

Mr. L. E. Chittenden, a distinguished lawyer of New York City, came to San Francisco as the agent and attorney of the plaintiffs, and instituted this suit. With him was associated Mr. E. J. Pringle of the local bar. Mr. S. M. Wilson and Judge McKisick were the leading counsel for the defense. Superior Judge Hunt dismissed the bill, holding that the charges of fraud were not sustained, that the majority of stockholders were not trustees for the minority, and had the right of control, and that the plaintiffs were not entitled to an accounting.

The great case of *Ellen M. Colton vs. Leland Stanford, Charles Crocker, and C. P. Huntington* one of the most celebrated, was tried before Superior Judge Temple of Sonoma county, being commenced in May, 1882, and extending over portions of three years. The plaintiff was the widow and sole devisee of Gen. D. D. Colton. Business relations between Gen. Colton and the defendants had commenced in the year 1870, when the General went with Charles Crocker, at the latter's invitation, to Wyoming Territory to examine a coal mine. The mine was bought by Colton and the defendants, and a company incorporated, Colton being made president and treasurer in 1871. In 1874 Gen. Colton purchased from the defendants 20,000 shares of Central Pacific Railroad stock, and 20,000 shares of Southern Pacific Railroad stock for the sum of \$1,000,000. He also afterwards bought large interests in other corporations controlled by the defendants—The Western Development Company, The Ione Coal and Iron Company, The Colorado Steam Navigation Company, The Occidental and Oriental Steamship Company, and The Southern Pacific Railroad Company of Arizona.

After the death of Gen. Colton, in October, 1878, Mr. Samuel M. Wilson prosecuted for a time the matter of settling up and adjusting the affairs of

his estate with the defendants. He and the widow concluded it would be for the best to sell to the defendants all the interests left by Gen. Colton in the various corporations named. They fixed upon the sum of one million dollars as the value of all these aggregated interests. Six months negotiation followed, during which period Mr. Wilson voluntarily stepped out and had Mr. Lloyd Tevis called in to pursue the business of settlement. Hon. John F. Swift was also advised with, but Mr. Tevis, (for some references to whom see Chapter XVIII), continued the main negotiation and effected the settlement that was finally reached. This settlement was evidenced by a written agreement entered into by all the parties on the 27th of August, 1879. The amount of money accepted by Mrs. Colton in full was \$200,000; of this sum she paid Mr. Tevis \$50,000, having stipulated to allow him twenty-five per cent. of whatever sum he should obtain.

The action now being noticed was brought by Mrs. Colton at the end of two years and nine months after the compromise settlement. She prayed for a decree canceling the executed contract of settlement, and requiring the defendants to account to her as devisee of her husband, on the ground that she had settled with them, under the influence of misrepresentations, threats, concealments, adverse pressure, belief, and fear, and in ignorance of the facts and of her legal rights."

There was an imposing array of counsel on the trial of this case. All the material allegations of the plaintiff were met by the most positive denial. The printed records and proceedings covered 12,000 pages, and the printed arguments 2,000 pages. Judge McKisick addressed to the court an oral argument that took ten days in delivery. This was by far the most elaborate argument made in the case, excepting that of Hall McAllister, on the same side, which took seventeen days. The result was a complete victory for Judge McKisick's clients, it being established in the fifty-seventh finding of the court, as follows:

"The said settlement, Exhibit 'F,' was made after investigations, in view of a settlement which had lasted for more than six months, and during the course of which all the matters and transactions concerning each and every of the corporations in which the defendants and Mark Hopkins and the said Colton were interested or concerned, and all the claims and demands of the estate of said Colton in regard to any of the property mentioned in the amended complaint, and all the claims and demands preferred by the individual defendants on behalf of all the corporations, and on their own behalf, were fully discussed, considered and investigated, and that during said investigations the said plaintiff was represented and assisted not only by the said Wilson and Tevis but by other gentlemen of skill, judgment and experience; and the said Wilson was a lawyer of great sagacity, experience, and energy; and that during all of the said period from the death of the said Colton to the making of said contract, said Exhibit 'F' devoted most of his time to the investigation of said matters and conduct of said enterprises; said Tevis assisted said Wilson, and was a man of great financial skill, ability and experience, thoroughly conversant with the values of the properties in ques-

tion, and as fully competent to estimate the values of the stocks and bonds in question, and the state of said accounts, and the propriety of making said compromise, as were the individual defendants, or any of them; and at the time of the commencement of this action the plaintiff had not discovered any fact or circumstance connected with the rights and claims of her husband, or concerning which any statements were made to her or her agents during said negotiations by the individual defendants or any of them, which was not known to her and brought to her knowledge, and that of her said agents, during the progress of said negotiations.

In social life Mr. McKisick is exceedingly attractive, unselfish, genial, kind-hearted, frank, and courteous. His society is sought, and he is personally valued by all with whom he is brought in contact. While he is a thorough lawyer, yet he does not confine himself to the science of the law. He is a lover of our classic literature, and at the same time a student of other and graver branches of knowledge. The prominent feature of his intellect is sturdiness. He is acute and discriminating as well, but it is his strength in dealing with principles and facts that distinguishes him, rather than grace or subtlety. There is a direct straightforwardness in his thinking and his acting that squarely confronts whatever is to be met or overcome. He is not impetuous nor vehement nor overbearing. In singleness of purpose he presses to the end he has in view. That end he never regards as unattainable until all his resources have been exhausted. When this is done, if he has failed he accepts the failure with equanimity, and turns, in the same spirit and courage, to the next encounter that awaits him. He is not, therefore, a man of spasmodic effort or brilliant episode. The course of his life runs smoothly and in full volume. His likes and dislikes are positive, and his words and his conduct are alike sincere. The stateliness of his manner repels undue familiarity, and the earnestness of his character does not invite jesting. His nature is chivalrous in its purity, its courage, and its gentleness—the kind of nature that loves children, honors women, scorns meanness and is a stranger to fear.

CHAPTER XXXVIII.

M. M. Estee—Boyhood Days in Pennsylvania—Wielding the Miner's Pick in California—Preparation for the Bar—Entry Upon Public Life—Honors from the People of Sacramento—Removal to San Francisco—Growing Wine While Practicing Law—Candidate For Governor in 1883—President of National Republican Convention in 1888—Some Personal Notes, With References to Newton Booth and John F. Swift.

Mr. Estee has his law office in San Francisco, and his legal residence in Napa; but Sacramento knew him first as a lawyer, and asserts the strongest claim to him as such. He was not of that limited school of vigorous minds to which I have several times pointed as adorning the youth of the Capital city in the middle and closing "Fifties," Judge J. K. Alexander, August Comte, and Thos. L. Carothers, being of the number. Mr. Estee was some years older than these; but he went to Sacramento and lived in their educational period, and while they were engrossed with algebra, syntax, and the tongues, he read law in the office of Clark & Gass.

It was in the year 1857 that he took up the study of his life, first pursuing it under Judge T. M. Pawling at Volcano, before going to Sacramento. He had worked as a laborer in the gold mines of El Dorado and Amador counties for several years, and then had taught school (1856) before turning to the law.

Mr. Estee was born in Warren county, Pennsylvania, November 23, 1833. He was a farmer's son. His education during his minority was obtained at the public schools of his county, and at Waterford Academy. The last named institution he attended for a year. His winters, between his sixteenth and twentieth years, were passed in teaching in his native county. In 1853 he came to California, arriving at San Francisco by way of Panama, in September. He was then twenty years old, and had borrowed of a neighbor in Pennsylvania his passage money, upon a promise to pay back double the sum in six months. After vain efforts to get employment in San Francisco, he went to the mining region before mentioned, and was enabled from his earnings with the pick to remit to his creditor in Pennsylvania the double sum he had obligated himself to pay, within the time limited.

It was in the year 1859 that Mr. Estee was admitted to the bar of the Supreme Court. He practiced law at Sacramento from that time until the year 1866. During that period he received some signal tokens of the respect and confidence of the people. In the legislative session of 1863-64, he represented Sacramento in the assembly. In the fall of 1864 he was elected District Attorney, and served the term of two years. The emoluments of

that office were considerable. Upon leaving it, Mr. Estee removed to San Francisco, and has ever since been a prominent figure at the metropolitan bar. Before this change of location, he had invested to some extent in San Francisco business property.

The removal to San Francisco was in 1866. After a year's association with ex-Judge E. H. Heacock, Mr. Estee practiced in partnership with John R. McLaurin for about three years, when Mr. McLaurin died. Mr. Estee and ex-Judge John H. Boalt then became associated under the style of Estee & Boalt. This union lasted prosperously for about ten years. Shortly after its dissolution, Mr. Ramon E. Wilson joined Mr. Estee, and some years later Mr. E. J. McCutchen entered the firm, the style of which is Estee, Wilson & McCutchen.

Mr. Estee is a Republican in politics, and as such was elected to the public places he held in Sacramento. He became even more prominent in the councils of his party after he removed to San Francisco. When Newton Booth was nominated by the Republicans for Governor in 1871, and entered upon his brilliant and successful canvass for that office against the incumbent, Hon. Henry H. Haight, Mr. Estee was made secretary of the Republican State Central Committee. For the zeal and ability he displayed in that position, his party showered upon him its applause. But two years later there was a serious division in his party ranks; and in the general election, (which was for members of the legislature and county officers), Mr. Estee and Hon. John F. Swift were among the Republican leaders who followed Gov. Booth into what some would call a revolt against the regular organization, while others would declare it a revolution. These gentlemen led an independent movement, which carried the legislature, and elected Gov. Booth to the United States Senate. Mr. Estee led the San Francisco delegation in the assembly, and was made speaker of that body. In that position his urbanity, ability, and decision were constantly displayed.

This Independent party dissolved, within a year, into its original elements, and Messrs. Booth, Swift and Estee were soon in full Republican fellowship again. At the legislative session of 1877-78, Mr. Estee was the Republican caucus nominee for United States Senator, but the Democrats were in the majority and elected James T. Farley.

Mr. Estee was a leading member of the last constitutional convention of this State (1878). He was elected as a non-partisan from the State at large. He was made chairman of the committee on corporations of the convention, and prepared the report of this committee on the important work by it accomplished. It is noteworthy that he was the only one of the eight delegates from the San Francisco district representing the State at large, who supported before the people the new constitution adopted in 1879.

In the year 1880 Mr. Estee was elected one of the freenolders entrusted by the people with the task of framing a new charter for San Francisco, his legal residence being in that city at that time. The instrument framed by this charter convention was rejected by the people.

Mr. Estee was the Republican candidate for Governor of California in 1882, but the Democrats, under the lead of Gen. Stoneman, was successful in that campaign.

The most distinguished place, perhaps, that Mr. Estée has ever held, in that it attracted to him and to his State the eyes of the whole country, was that of President of the National Republican Convention of 1888. His latest public trust was as a delegate to the Congress of nations of North, Central, and South America, which opened at Washington, D. C., on the 4th of October, 1889.

Mr. Estee is a prominent Mason and Odd Fellow, and was a representative in the Supreme Lodge, I. O. O. F. that sat at Baltimore in 1869. He married in February, 1863, Miss Francis Divine, daughter of Judge Davis Divine, of San Jose, and has two daughters. He has a valuable farm in Napa County, of which 410 acres are in vines. He is a large wine grower and was a generous contributor of wine to the Grand Army Encampment at Columbus, Ohio, in September, 1888. He has a completely equipped wine cellar that cost him \$15,000.

Mr. Estee is of striking personal appearance, above the average height and weight, and of most agreeable address and presence. As a public speaker and at the bar he is entertaining and convincing, always dignified, and leaving the impression of sincerity. Besides his forensic efforts he has delivered some of the ablest addresses ever heard at our agricultural fairs and at Fourth of July celebrations. He has one signal quality that shines out in his distinguished friend, ex-Governor Booth—the ability to weigh evidence—not in lawsuits merely, but in matters that divide men generally—to separate fact from fiction, to get at truth, and support the better cause.

They used to say of Gov. Booth, in Sacramento Lodge of Odd Fellows No. 2, in days now long gone, that when he took sides on a proposition he always carried everybody with him. It was his habit to wait until all others had spoken. Sometimes a debate would cover several meetings, but Booth would know when the crisis was at hand, and he would speak just before the question was put. Of course he would speak well and to the point, having the arguments on both sides nut-shelled in his mind. So it was a common saying, "It's very dangerous to have Booth against you, when he speaks just before the question is put."

Mr. Estee has always exercised a like power of command and in the same kind of sphere. I have witnessed it in Odd Fellows' lodges in San

Francisco. On such occasions his manner would be uniformly paternal, and his words full of the best counsel.

After a long period of uninterrupted success at the bar, and distinction in public life and politics, Mr. Estee is just at the zenith of his powers of mind. He has accumulated a respectable fortune, and there are very few of our notable men whose personal influence is so wide and commanding.

CHAPTER XXXIX.

Charles N. Fox—The Latest Accession to our Supreme Bench—Cradled in a Michigan Log Cabin—Fighting Life's Battle at Fifteen—At the Ann Arbor University—Printer and Country Editor—Early in Politics and Public Life—At the Bar in California—Work in the Legislature—General Attorney of the Spring Valley Water Works of San Francisco—The Long Struggle between the Water Company and the City—Interesting Personal Notes.

After I had looked through the record made by the Hon. Charles N. Fox, as a lawyer and legislator, and the following chapter had been written, the distinguished gentleman was commissioned a justice of the Supreme Court by Hon. R. W. Waterman, Governor of the State, to fill out the unexpired term of Hon. Jackson Temple, resigned. He took his seat on the Supreme bench on July 1, 1889, just as the present edition of the *BENCH AND BAR* was about to be given to the public.

Charles Nelson Fox was born in Redford, Wayne county, Michigan, in a log cabin, surrounded by a dense forest, on the 9th of March, 1829. He was the eldest of a family of eight children, whose parents had moved into the great peninsula when that territory was a wilderness, and the city of Detroit was the only place of any importance in all its borders. Like all the pioneers of that country, his parents were poor, and such schooling as Charles received was had in the traditional log school house, for a few months only in each year, and to attain this he was compelled to walk one, and sometimes two miles to school. Dividing his time between the school and the farm until he was fifteen, at that age he relieved his parents of his support, with their approval, and went to Ann Arbor, determined to make his own living, and if possible work his way through the university, then just opened. Securing a place where he could work for his board and lodging, he matriculated at the university, and spent some time in the study of Latin and Greek, when he was taken sick. This involved a loss of six months in his studies, and postponed for a year the period of his possible graduation. At that time the only course of study open at the university was the classical course. After much reflection young Fox concluded that in the struggle of life for a poor man, the four or five years which must be spent in the university would not be compensated by the benefits derived from the course of study then opened to him. He has many times since doubted the wisdom of that conclusion, but right or wrong he acted upon it, and abandoned the university for a printing office, where he mastered every department of the printers' art as then practiced in Ann Arbor. At an early age he became

somewhat noted as a country editor. From infancy he had known intimately and been a favorite of Gen. Lewis Cass, and he early began to take an active part in politics. In 1848, when only nineteen years old, he made his first speech to a mass meeting, when as president of the Young Men's Democratic club of Ann Arbor he opened the campaign of 1848 with a speech, and introduced General Cass, who had insisted that Charles should speak first, and who expressed his gratification at being introduced by one of his own boys. The General had before that offered his young friend a place at West Point, which he had declined to take, and which declension he has ever since regretted. At that time he preferred the navy, but into this the General refused to place him, unless he first got his father's consent—a thing which young Fox believed would be impossible, and so never made the effort. He seemed older then, in proportion to his years, than he has during the latter periods of his life. Twice before his majority he was tendered important legislative positions, which he declined on account of his age, but without giving that as his reason. At twenty-one he was made chief deputy in the office of Recorder of Deeds for his county, and for two years was practically the chief of that office. During this period he was also elected City Recorder of the city of Ann Arbor. A vacancy occurring in the office of mayor, he served *ex-officio* in that capacity for a portion of the term; in all these places serving acceptably to the people.

Retiring from public place he entered the law office of Kingsley & Morgan to complete the study of the law, which he had already commenced. While yet a student in this office, he attracted the favorable notice of the great commercial agency of Bradstreet & Company, by his peculiar ability to "read between the lines," and understand the motives and intentions of men—a faculty which he has ever since retained in large degree—and he has ever since been and still is a trusted counsellor of that great commercial house. He was admitted to the bar of the Supreme Court of Michigan in 1856, and in 1857 his parents and all other members of the family having already settled in California, he came hither, arriving in August of that year, immediately locating in the county of San Mateo. In November of that year, a vacancy occurring in the office of District Attorney, he was appointed to fill it, and by successive elections held that office for five years, when he declined further election.

In the early struggles of the Spring Valley Water Works to gain a foothold in San Mateo county he was retained against them, and for some time succeeded in preventing them from acquiring any rights necessary to the construction of their works. Finally, having been beaten in all litigation, the company retained him to acquire such rights as they desired, and he at once went to work, and without litigation secured for them all that they had theretofore been seeking through the courts. He so managed the business

of the company in that county that for ten years it had no suit there of any kind.

Upon the organization of the San Francisco and San Jose Railroad Company, Mr. Fox became the local attorney of that corporation to secure the right of way through San Mateo county, and continued to act in that capacity until the road was sold out to Newhall & Company. During that time he became the general attorney of Chas. McLaughlin, and ultimately the attorney and president of the Western Pacific Railroad Company—a place which he held until that road was sold out to the Central Pacific Company. These duties having brought him to San Francisco, he was appointed general attorney of the Spring Valley Water Works, more than twenty-five years ago, and has held that position ever since.

In his early practice in the State he became somewhat noted as a criminal lawyer, and met with more than ordinary success in that line of practice, but after getting so much engaged in corporation law, he practically withdrew from criminal practice and has since given that department of law very little attention. However, within the last three or four years he has been engaged in homicide cases, notably that of *The People vs. Prindle* in Alameda county, and *People vs. Bowers* and *The People vs. Gardner* in San Francisco, in the latter of which he acted for the prosecution.

During Mr. Fox's incumbency of the office of District Attorney a statute took effect requiring that delinquent taxes should be collected by suit, and for two years nearly all the heavy taxes of his county, San Mateo, were contested, but never with success. Almost immediately upon retiring from office he was retained to defend against similar claims, and then raised the question of the unconstitutionality of the revenue laws then in force, by reason of the large exemptions from taxation which were made by those laws. Upon this point he prepared an elaborate brief, which was not only used in the courts, but in the legislature, and he and others who subsequently joined him in the contest kept up the fight until at last the Supreme Court sustained the point and held the exemptions to be unconstitutional. The legislature then changed the laws, and since that time taxation in that State has been perhaps more uniform than in any other State in the Union.

Mr. Fox was twice named, but refused to be a candidate, for judge of the old Twelfth District Court. Several times he was urged to accept legislative and congressional position, but always refused, except at the first session of the legislature under the new constitution of 1879, when he was chairman of the judiciary committee of the assembly. The records of the hundred days of that session show an amount of work well done by him, rarely if ever performed by any other man at any one session. Chancellor Hartson, who was a member of the same body, said of Mr. Fox and the

work that devolved upon him at that time, "I would rather spend the time of this session in the penitentiary than in his position."

The constitution had wrought many radical changes. All the laws of the State had to be brought into harmony with it, and at least three-fourths of all the bills went to his committee. While the statutes of that session show a great amount of work accomplished, the burthen of his work, and that upon which he did the State the best service, is found in the mass of bills which did not get into the statutes. It is said that in the hundred days he reported a thousand bills for indefinite postponement, and very few bills so reported were ever passed. Considering the rapidity with which one in his position was compelled to think and act, under such circumstances, it is a curious fact that every measure that was passed against his opposition, on the ground of unconstitutionality, and that has since come up for judicial determination, has been declared to be unconstitutional. Perhaps the most prominent of these was the revenue bill passed at that session, against which he voted and spoke, and filed a written protest. At the very next session the legislature passed a new bill, bringing it into harmony with the views which he then expressed. A few of the bills for which he voted, generally those which had been considered and were favorably reported by other committees, have also been held bad; but, in view of the necessity for rapid action, and consequent want of opportunity for reflection, at that session, the wonder is that the mass of work done was not chaotic; that it was not largely due to the chairman of the judiciary committee.

Mr. Fox's fight on behalf of the water company with the City of San Francisco was a long and bitter one, but always conducted on his part in a manner creditable to himself, and finally resulting in a triumph which is scarcely yet realized by those who, during the conflict, so frequently rejoiced at his apparent defeats. In a dry season, when the company was threatened with a water famine, the city for the first time claimed the right to tap the mains and take water at its pleasure, free of charge, for the flushing of sewers, irrigation of parks, and all other municipal purposes that it might desire. Upon inquiry from the company, Mr. Fox advised it that the city was not entitled to water free of charge, for any purposes "except the extinguishment of fires and in cases of other great necessity;" and he interpreted this last expression to mean, "some great and sudden emergency, out of the usual course, and for which provision could not be made in advance." Upon this issue the parties locked horns, and the fight was kept up for several years, with varying success, during which the new constitution was adopted, in which it was thought that provision had been made for the final settlement of the entire controversy in favor of the city. But as we now look back over the record, after the smoke of battle has cleared away, it is curious to observe that in every instance, every court that passed upon the ques-

tion sustained Mr. Fox's position as to what the law was, but refused to make any interpretation of the meaning of the words "other great necessity." All they would say upon that point was: "no case has yet been presented in which we can say the use to which the city desires to put the water is not a great necessity." And when at last the people were rejoicing over the fact that by the new constitution the use of water had been declared to be a public use, and the regulation thereof to be vested in the public authorities, and the company had been deprived of the power even to have a voice in selecting the board to fix the rates, Mr. Fox fairly snatched victory from defeat, by instituting and following to the Supreme Court of the United States a case, for the ostensible purpose of determining the validity of that provision of the constitution. But he followed it until it had been clinched by the court of very last resort, and could not be changed. Then he instantly turned around and commenced a new case, upon the proposition that the same instrument which had accomplished that result had taken away from the city all right to free water for any purpose whatever.

Then for the first time the full strength of his hand was seen, and it was found too strong to be resisted. The courts were compelled to sustain him, and since then the city has had to pay for its water like any other consumer.

For twenty-five years before his recent elevation to the Supreme bench, Mr. Fox had his office in San Francisco. Besides his duties as attorney of the water company, he was engaged in general practice, about half of the time in partnership with A. and H. C. Campbell, and the balance of the time in partnership with M. B. Kellogg until the year 1889, when F. R. King was added to the firm.

Outside of his temporary reverses with the city of San Francisco, the register of his cases shows a proportion of successes to defeats, almost unparalleled in the history of the State, and with the single exception above stated, where it is now apparent that he made the fight expecting defeat, but purposing to take advantage of it and turn it into a victory, not a single instance is recalled where he has been finally overruled on a question of constitutional law.

Mr. Fox's memory of names and dates is treacherous, but it is wonderfully tenacious of facts. In the trial of cases it has been his habit to take very few notes other than the names of witnesses and a simple word or two indicating the point to which the witness is called, relying upon his memory for the purpose of argument, and upon the reporter's notes for the making up of a record if appeal should be taken. No matter how long the trial or how multifarious or in what order the testimony was given, when he came to the argument of the case before the jury, he weaved the facts together in chronological order, and with a clearness which, if it failed to make them

invincible, did so because the evidence itself was insufficient for the purpose; and all this without any reference to notes whatever, unless it was for the suggestion of a name.

Although an ardent lover of the principles and teachings of the leading fraternal organizations, and one who has given much attention to work in these bodies, he is not what is ordinarily termed a "society man." His profession, the lodge room, and his home have always filled the measure of his desires, and outside of these he has never seemed to know what was going on around him. He has given strict attention to his own business, none to the business of others in which he was not interested. So indifferent has he been in this regard, that he would and still does pass his best friends, and not unfrequently his own wife, on the street unconsciously and without recognition. Judge Fox has four children, three of whom have married. Since the year 1876 he has resided in the city of Oakland.

CHAPTER XL.

Samuel M. Shortridge—The Leading California Orator—A Plea for the Revival of Oratory at the Bar—Mr. Shortridge's Early Life of Toil—Working in the Mines—Teaching in the Public Schools—Career at the Bar—Presidential Elector in 1888—Extracts from His Arguments and Orations—Further References to E. D. Baker, and Other Men of Note.

We are in the presence, now, of the orator of our bar. Baker's voice has long been silent. Edgerton's was lately hushed. Thomas Fitch, it is true, survives, and he merits the national fame that he has won; but he is a bird of passage, although of brilliant plumage. He has never belonged to any bar in particular; besides, he is noted as an orator first; as politician second; and as lawyer third. Mr. Shortridge has a local habitation as well as a name. He employs the orator's art to complete the lawyer's character; and, being orator as well as lawyer, he stands forth the finished Advocate.

We look to the bar and the pulpit for oratory, but even in these splendid fields of display, the true orator is rarely met. Yet true oratory is essential to the full lawyer.

Many years ago I heard a jury address by one who enjoyed a high reputation as an advocate. He was shortly afterwards a Judge of the Supreme Court. On the occasion now adverted to, a lawyer at my side inquired, "Was not that a fine exhibition of oratory?" It had been better to ask me to concede that it was a good argument, clear, well expressed, incisive. I had seen crowded auditories catching with delight every word of Baker. We may read of Chatham, Fox and Burke, and not blush for Baker. When I first heard him my standard was high, as was my expectation. I had turned away sadly disappointed from the exhibitions of many who enjoyed local reputation; for I had caught the picture of Fox "in the torrent of his vehement and overwhelming logic," and again, "in the full paroxysm of inspiration, foaming, screaming, choked by the rushing multitude of his words." I had read that Bushe, when a strong theme claimed him, could not open his lips or raise his hand without captivating his hearers. And as I recalled these splendid types, and there arose before the mind, grander than all, incomparable Pitt, I wondered if such power was possible in man.

I was talking with Judge James V. Coffey once about Sheil's Sketches of the Irish Bar. The Judge, born in the United States, is of Irish parentage. Knowing his loyalty to truth as well as his calmness of judgment, I called his attention anew to some of the most lavish expressions of Sheil; such, for instance, as those I have just quoted, and that about Bushe's "Mirabeau-

formed figure," and "the might of his reasoning, the music of his diction, the absolute enchantment of his exquisite delivery."

A little doubtful that such beings ever dwelt on the earth, I asked Judge Coffey what *he* thought of it. "Judge," I inquired directly, "do you think that Sheil tells the truth?"

"Yes," answered the Judge, "he tells the truth, but he tells it in an Irish way."

What I have said of Baker, in Chapter I, and elsewhere, has not been said "in an Irish way," as a great cloud of witnesses can testify. And I don't propose to say anything about Mr. Shortridge "in an Irish way." But the truth is, that when due allowance is made for the Irish author's enthusiasm over his Irish brother lawyers, our Edgerton, Fitch and Shortridge would not suffer by comparison with the average of them; whereas, our Baker probably eclipsed them all.

Let this chapter stand as a plea for the revival of oratory?

Why is elocution neglected? Cicero no longer a pattern? Demosthenes no more an example? Quintilian no more a study?

It may be that there is neither as much need, nor opportunity for high oratory now, as in Quintilian's day, when the advocate and orator were one; or in the most exciting periods of British history, when the greatest advocates were the greatest orators; but as long as law shall be practiced before judges and juries, the industrious lawyer, well grounded in the principles of his science, who courts the most closely this powerful and brilliant auxiliary, will grasp the most lucrative causes, and win the brightest fame.

Fine speakers do not now attract as large audiences as in former times, but this is owing in a great measure to the improved facilities for the dissemination of news. Those who do not now avail themselves of an opportunity to hear a popular orator or great advocate, know that they will have a prompt and full report of the speaker's utterances. It was not thus in the days of monster meetings before A. D. 1850.

There is another cause, however, for the decay of oratory. And it is one which argues either a degeneracy in public taste or a lack of public sagacity. Too many are apt to credit the orator with no talent. Take Mr. Smith and Mr. Jones, two advocates of equal ability, of the same caliber of mind and range of knowledge; let them both prepare for a jury; let Mr. Smith clothe his address in plain garb, and Mr. Jones grace his thoughts with the flowers of speech and utter them with swelling melody. The majority of their hearers, including even members of the bar, will say, "Mr. Jones is the better speaker, but Mr. Smith is the better lawyer."

The verdict should be: "They are both good lawyers, but Mr. Jones is an orator as well; Mr. Smith, being no orator, is no match for Mr. Jones before a jury."

There are orators at the bar who are orators only ; and orators generally are loth to leave the daisy-lit fields of poetic speech to trudge along the broken ground of solid fact. Therefore, the popular idea just spoken of is not wholly inexcusable. It is, nevertheless, in its general application, erroneous, and to it is to be ascribed the reason why lawyers would rather see their names appended to an able brief than to win the applause of a crowded court-room or affect a jury to tears. It is simply because they had rather be accounted lawyers than petty triflers with pretty words.

Yet, surely, if Baker were here again, he would redeem his fame, and Mr. Shortridge, at least, will not forget that bright example.

Mr. Shortridge is young at the bar, and, indeed young in life. He was born in Mt. Pleasant, Henry County, Iowa, on the 3d of August, 1861. His remote ancestors lived in Scotland and the north of Ireland. Some four generations back, the family was established in Kentucky, where it produced several great lawyers and preachers. It divided there early in the present century, one branch going north, the other south. Mr. Shortridge's father, Elias W. Shortridge, and uncle, Abram C. Shortridge, were born in Indiana; his mother also. The unclè is still living there, and is the President of a college. The father prepared himself for the bar in company with Oliver P. Morton, but, without entering upon the profession, turned to the pulpit, and became a clergymen of the "Campbellite" or "Christian" denomination, in which President Garfield was prominent. He, too, is still living in Arizona. He is a man of deep and cultured mind.

In Kentucky the Shortridges, like the family of Abraham Lincoln, intermarried with the family of Daniel Boone. The branch that went south adorned the history of Alabama with distinguished names. As late as the year 1855, the strong mentality of the race was exemplified in Hon. George D. Shortridge, a man of great learning, and one of the Circuit Judges of that State. But the most commanding name in this branch of the family was that of Eli Shortridge, father of George D. Eli Shortridge was also a Circuit Judge in Alabama, but had won an enviable reputation as a lawyer and orator in Kentucky, where he was born. In a volume on the noted men of Alabama, written by Hon. William Garrett, who had been Secretary of State, is a very entertaining notice of Eli Shortridge, part of which calls for copy here. It is high praise, but evidently the truth, and not told "in an Irish way." Mr. Garrett says of Eli Shortridge:

His addresses to the jury, while at the bar as an advocate, were models of beauty and eloquence, so pronounced by competent men who have heard him. He had a peculiar softness and euphony in his voice which exerted a charm on the listeners. Nothing could be more captivating. It was like the tones of a parlor organ, rich in melody and gushing out in a perpetual concord of sweet sounds.

If Cicero himself had been present, he must have been satisfied that the Kentucky and Alabama orator had reached as near perfection in this respect as it was permitted

any man to attain. I speak of the art or gift of delivery alone. His style, however, was not less beautiful in the purity of diction; and it seemed as if he always held a check on himself, as if to curb a vivid imagination. There were occasions, however, when he soared beyond this restraint, though never to the height of his capacity. In his youth he had drunk from the purest fountains of eloquence, with such models as Clay, Crittenden, and Barry, all of the first order, to influence his taste.

Mr. Shortridge's father removed with his whole family to Oregon in the year 1874, and came with them to California in 1876, settling at San Jose. At that place Samuel graduated from the High School in 1879, delivering, at the graduating exercises, the valedictory address. Subsequently, he received a first grade State certificate, and went to Napa County, where he taught school for four years, at different places. While principal of the public schools of St. Helena, in that county, in 1881, he read before the Napa Teachers' Institute a thoughtful paper on "Corporal Punishment," in which occur these words:

We should be more fully imbued with the sacredness of our great trust. It is something more than imparting knowledge, something more than teaching "frigid philosophy"; it is the fitting of an immortal soul to meet the difficulties of life, and triumph over death. We do not teach for a day, but for all time. Our occupation will never be gone. As long as man's heart yearns for knowledge and freedom, as long as the soul in darkness and vapors aspires for light and purer air, as long as progress remains a law of nature and of God, so long will the schoolmaster have a mission of usefulness, dignity, and honor. And in the end the teacher who blends kindness and love with logic and rhetoric, will effect more good than he who employs brute force. The teacher of the future will hold in one hand the Golden Rule, and in the other the Constitution of his country. Rising above the fog and mist that have so long shrouded the profession, and standing on the heights of knowledge, catching the glory of a brighter day, he will be an object of love and confidence to children, of inspiration to youth of emulation to all. The nearest way to the mind is by the heart, and authority is most easily exercised when sanctioned by the consent of the governed. It was not Alexander, but Plato, that elevated the Grecian age; it was not Caesar, but Cicero, that glorified Rome; it was not Cromwell, but Shakespeare, that immortalized England.

During this period of Mr. Shortridge's career his great mental activity was evidenced by lectures to his schools on instructive themes, and by public addresses and contributions to the press on questions of popular concern. Many of the editorials of the *Daily Times* and *Daily Mercury*, of San Jose, were from his pen.

Mr. Shortridge's experience as a principal in the public schools, confirmed the high estimate he had been taught to place upon our common school system. Some years after he had turned from that sphere of usefulness, and became a noted orator, he used these words on a memorable occasion:

Ignorance is Egypt; knowledge, Athens. Ignorance is darkness; knowledge, light. Ignorance is weakness; knowledge, strength. Ignorance binds the shackles of slavery around the limbs of man; knowledge places on his brow a kingly crown, and in his hand the scepter of a conqueror's power. Our magnificent system of public school education

though imperfect and susceptible of improvement, is the pride of our country, the crowning glory of our Republican institutions, the safeguard better than standing armies around the constitution and liberties of this great people—schools where rich and poor meet on a common level and daily learn the needful lessons of equality of rights and equality of privileges—schools out of which have gone and will go the nation's sturdy strength and unfaltering hope—schools wherein are trained the soldiers to march and win battles and be crowned with laurels of victory in the ranks of peace. In those schools let not only abstract truth, morality, and varied handicrafts be taught; let love for that blessed banner, patriotism, loyalty, be inculcated; let the fundamental and eternal and realized principles and truths of the Declaration of Independence be written on the heart, be engraved on the mind; let our form and system of government be made a leading branch of instruction, and the opportunities it affords to deserving industry and ambition be pointed out, so that the rising generation, proud of their country and grateful for their heritage, may come more fervently to love the land of their birth or adoption, and to practice those virtues in the administration of public affairs, which alone can render their country respectable among the nations of the earth.

After coming to this State and before going to school at San Jose, young Shortridge and his brother Charles M. worked for some time as common miners, in the mines of Nevada County. Even then Samuel had the law for his goal, and he kept his eyes fixed there through a boyhood and early manhood of toil. His opportunity came in the year 1883. He was twenty-two. Having read law books with increasing interest in rare moments of leisure, he now began the study with system and devotion. Mr. D. M. Delmas, whom he had known at San Jose, had acquired wide celebrity as a lawyer and removed to San Francisco, where he had placed himself beside the two or three very foremost men of the bar. To him, in his San Francisco office, Mr. Shortridge went, having just resigned the principalship of the public school at St. Helena. The first responses of the little giant of the bar to his tall young visitor were not encouraging—he had witnessed such general failure among law students, so much mistaken ambition on the part of mediocrity. The young applicant pressed his personal cause with some deliberate words. The lawyer listened well, and, extending his hand, said in a tone that thrilled, "You want to be a *lawyer*, do you!" "Yes sir, I do," answered young Shortridge. He was invited to remain, and then began an earnest effort—"to be a *lawyer*."

While in Mr. Delmas' office, Mr. Shortridge went through a course with the juniors of the Hastings' Law College. Such had been his prior law reading that he found it unnecessary to graduate from that institution. He presented himself, in a large class of applicants, to the Supreme Court in the month of May, 1885, and, answering correctly every question put to him, was one of the few who at that time were admitted to practice. It was in the Presidential campaign of that year that he became known to the people of the whole State as an orator, while canvassing in support of James G. Blaine, under engagement by the Republican State Central Committee.

The comparatively short period that has elapsed since Mr. Shortridge came to the bar, has been long enough to realize to him his boyhood hope. He has done faithful work. He has displayed high ability in both the civil and criminal departments of the practice. A tireless worker still, he gives the most painstaking effort to the preparation of his causes for trial. His commanding form is sustained by robust physical strength, and he is capable of great endurance, both of mind and body. His ambition is strong, his aims are high. He has an enthusiastic love for the profession. And his zeal is not that ardor of mind that burns or cools with circumstance, but has its spring in a healthy intelligence. He has the intellectual qualities that are the masters of victory.

As a public speaker, Mr. Shortridge is earnest but not excitable, fervid but not fiery. He is a warm but earnest speaker. His expression is careful, his gesture graceful, with a commanding sweep of arm. His voice is strong, full, and unflinching, of pleasing quality, and thunders or softens at his will. His model is Henry Clay, and he is generally styled "the Henry Clay of the Pacific Coast." He has been a close student of rhetoric, but has sought to learn oratory and acquire the art of eloquence from the great originals—the perennial fountains—Demosthenes, Cicero, Burke, Chatham, Webster, and Clay; regarding them as the masters, and an intimate acquaintance with them as essential to a kindred excellence.

Since coming to the bar Mr. Shortridge has been the "Orator of the Day" on many great occasions. To be specially mentioned are his several orations on Memorial Day: at Fresno in 1886, at Modesto in 1887, and at St. Helena in 1888. His orations, also, at the unveiling of the Liberty Monument in San Francisco (Adolph Sutro's gift to the city in 1887); on Independence day, at Redwood City in 1887, and at San Francisco in 1888. He canvassed the State again in the presidential campaign of 1888, when the tariff question was uppermost. He treated the question with much depth of thought. Indeed, his political party makes its first call on him in every general campaign to discuss living issues.

In the campaign of 1888, Mr. Shortridge came, in the course of his canvass, to Nevada City. As stated, he had been a common laborer in the gold mines of that vicinity. He found few persons now who knew of his life there. He had gone away poor and friendless. Unwept? Yes, but he was now to utter words that would draw tears. Unhonored? Yes, but he was now driven at the head of a long procession through bonfires and under bannered canopies. Unsung? Yes, but now heralded by his own fame, cannon proclaimed his presence. In his speech on that occasion Mr. Shortridge could not fail to draw contrasted pictures of the past and present. Referring to his former experience in that section, he turned aside to pay eulogy to the men whose hands "unlocked the secret vaults where treasures lay entombed."

His fervid words moved the multitude to high excitement. An old, gray-haired miner pressed his way through the mass up to the platform, exclaiming as he went, "I want to take you by the hand." He accomplished his purpose "amid wild applause." without disturbing the speaker or the meeting, the interruption having the effect to intensify the deep feeling that was thrilling all hearts.

A San Francisco paper thus humorously referred to this scene:

Sam. Shortridge, the rising young Republican of this city, knows of no orator of his age that can excel him on the extempore stump, but he does not regard his powers as supernatural, as will be seen by the following anecdote: Sam had been speaking to a large audience of horny-handed sons of Nevada county; and had made a great impression. When he descended from the stump, an enthusiastic miner fell down at his feet, clasped his knees, and kissed the hem of Sam's black frock coat. At this the young orator was not abashed. He merely said, laying his hand compassionately on the countryman's head, "Arise, I am only a man."

In this campaign Mr. Shortridge was one of the Republican nominees for presidential electors. His party carrying the State, he was chosen secretary of the California Electoral College, and his silk hat was made the College ballot-box.

I have alluded to the pains and patience of Mr. Shortridge in preparing his cases. I first observed this in extraordinary measure on the trial of a poor Chinaman for murder in San Francisco. The trial lasted six days. Mr. Shortridge was alone for the defense, against the District Attorney and one of his assistants, and two other attorneys specially employed. His study of the case led him to believe his client was innocent. A Chinaman had been killed, and there had been a mortal feud existing between his clan or family and that of the man indicted for the murder. Mr. Shortridge believed that the friends of the deceased were ready to "swear away" the life of any member of the family of their enemies, without regard to which one of the latter did the murder—and indeed, whether any of the latter family was guilty or not. He made a study not only of the case, but of the Chinese character, purchasing various books on China and its people for that purpose. When he came to cross-examine the witnesses for the prosecution, he made it evident that they had conspired to accomplish the defendant's death by perjury. In his address to the jury, as public feeling ran high against the Chinese, he said:

I confidently believe my cause will receive from you the same fair, just, and impartial consideration that it would receive were it the cause of one of our own race and blood, of one who knelt with us at the same altar, uttered the same prayer, and subscribed to the same faith.

Continuing, he paid this high compliment to the Judge, Hon. Daniel J. Murphy:

Let me here and now tender to His Honor on the bench my profound and grateful thanks. Sometimes stern, but always just; erring, if at all, on blessed mercy's side, deeply learned in the law from long study and experience, unawed by public clamor and unswayed by prejudice, he has calmly and with master mind directed our investigations and at every moment evinced an ardent desire to give to this unfortunate and lowly defendant (the member of a proscribed and hated race) every right which our laws guarantee to all within their jurisdiction and protection. Blessings forever rest upon such a judge! Enthroned in our affections, possessing our unreserved respect and highest esteem, and enjoying our entire confidence, long may he preside within this sacred place as high priest at the altar of truth and justice!

To the jury he said:

Ten days ago we were strangers—you may never have known of my existence nor marked my humble walk through life. Not so now. I accepted you as jurors in a case of such momentous interest to my client, because I knew you to be men engaged in legitimate industries, because you made answer to my preliminary questions touching your qualifications to minister at this altar, in a frank and manly tone. As you are aware, I might and could have challenged you, and, without assigning my reasons for so doing, excused you from serving on this jury. But you said, nay, more, you registered a sacred and solemn oath in the name of the eternal and just God, that you could and would try this most important cause—not less important to the State than to this unlettered defendant—fairly and impartially, and I believed you, I trusted you, I accepted you. I did not err. I trusted you then, I trust you now, confirmed in my belief in your inflexible integrity; thrice assured of your scrupulous desire to do unto others as you would be done by, and confident and happy in the belief that you will continue to act in the spirit of that Golden Rule, taught centuries ago by Confucius, and exemplified from Nazareth to Calvary by our just and suffering Savior.

I trust I have not appeared too eager to preserve the rights of the accused, to elicit all the facts, however minute, that throw light on his motives and conduct. Conscious of my grave responsibility, and mindful of my own oath as an officer of this court, I have endeavored to discharge my duty, my whole duty, and, I pray you, let no act of mine, no failure of mine, no forgetfulness on my part, injure the cause of the lowly man who has relied on me, trusted me, told me his wrongs, and asked me to present them to you. I have spared no labor, however arduous; I have spent sleepless nights to lay before you all I promised, to prove all I said I would prove; and, though the thoughtless may condemn, all good and just men will rejoice if my poor efforts shall this day be crowned with success.

Alluding to what he considered as the over-zealous conduct of the District Attorney, he uses these words:

He should seek to vindicate the innocent as well as convict the guilty. As said by a learned judge who adorned the Supreme bench of a sister State, he does not occupy the "position of a plaintiff's attorney." He is a sworn minister of justice; and he weakens the law, he dishonors his sacred office, he breaks down the guards thrown around every citizen, he invades the security of every household, he becomes an instrument of terror and death, meriting the contempt and scorn of all good men, when, carried away by professional pride, or moved by a desire for the empty applause of the hour, he seeks a victim, when he uses his great power, not to elicit all, but to suppress a single fact, when he forgets his high duty to the State and ceases to be as impartial and fair and just as the judge upon the bench.

Mr. Shortridge made many interesting observations on Chinese customs as to homicide and its punishment; on the Chinese conscience, the Chinese family, the Chinese idea of vicarious punishment, etc. The evidence of every witness was dwelt on. He charged the prosecution with suppressing evidence that would have helped the accused, and said, on this point:

The State has seemed to desire to conceal something, to convict somebody, no matter whom. Does California, generous and just, renowned for "Christian service and true chivalry," desire to have a blot placed upon her bright escutcheon, an ineffaceable stain of innocent blood upon her hitherto fair and untarnished name? No, we do not endorse the Chinese idea of blood and retaliation. We follow in the footsteps of Christ. We are not moved, the State should not be moved, by an unholy lust for blood.

Yet the District Attorney and special counsel seek an excuse for this wilful suppression of evidence which might inure to the benefit of the accused, from an ill-advised, harsh, and unjust rule of law. For shame! The State should pursue a nobler course. If any harm comes to this hunted and unfortunate man—if he is deprived of another day of his liberty—by this suppression of evidence which would or might have even more conclusively established his innocence, (and I say it kindly), let them answer to their own conscience, let them in penitence explain before the judgment seat of God.

Mr. Shortridge closed his address to the jury in this case as follows:

God grant that should you ever journey to a foreign, friendless land, on a peaceful errand, and through misfortune or the malice of enemies be thrown into a loathesome dungeon and arraigned in a strange court, charged with a heinous crime—a mob of remorseless and vindictive conspirators plotting for your life—God grant, gentlemen, that you may have as upright, fearless and impartial judges as I sincerely believe you now to be. * * * I plead not for a murderer crimsoned with the blood of the slain, but for a man falsely accused, for a human being guiltless of crime. In the name of the law which says that no man shall be presumed guilty—the law before which king and peasant, lofty and lowly, rich and poor, clad in purple or clothed in rags, native and foreign-born, our brother and the stranger within our gates—all, all stand equal and are vouchsafed the same protection; in the name of Christian humanity and the Christian conscience which are shocked at the Chinese idea of atoning for the death of a member of a "family" by the blood of an innocent victim; in the name of celestial Truth who has placed her bright shield over the heart of this unfortunate man, "suckled in a creed outworn," to save him from all mortal harm—I stand and plead for justice—for justice, the attribute and off-spring of the eternal God—for justice, whose undisputed empire on earth and in heaven is the heart of all true men!

Bear in mind to the close of your deliberations, gentlemen, that the defendant was not and is not obliged under the law (which is founded in reason and justice) to prove his innocence. The burden rests upon the State to establish his guilt and to establish it beyond a reasonable doubt. He was and is guarded and hedged round by the law which applies to all, protects all, preserves all in the peaceful enjoyment of life and liberty. The law is a shield and not a sword; a castle of refuge, not an ambuscade of danger; a deliverance from enemies, not a snare for the feet of the innocent. And this defendant covers his heart with the same shield that covers yours, that covers mine. He stands before you clad in the armor of truth—the impenetrable armor God has given to the innocent. He stands behind the immovable breastwork of that all-equal, beneficent law, safe beyond the reach of perjury, beyond the clutch of opium fiends, beyond the

teeth of the insatiate monsters, the human hyenas that even now pollute this temple and clamor for his blood.

Gentlemen, will you gratify that Chinese notion of justice, that heathen idea of retaliation, that barbarous conscience which has filled the Eastern world with suffering, tears and death? No, you will not. Here and now speedily deliver him from danger, rescue him from the merciless enemies that encompass him. Let him return to his honest labor, to his industrious and harmless life. Let him walk from this sacred temple of justice, not of vengeance, free—free to live, free to die, free to approach the common and all-equal grave, free to enter into the presence of a merciful and compassionate Savior; whose blood and tears redeemed the world, and before whom in the fullness of time we shall all stand penitent—judge, jurors, counsel—and ask for and receive justice and mercy! Send this poor hunted and pursued man forth, free, that the sunshine and smile of God may fall upon and bless him, as humbly and bowed low, I reverently trust they may fall upon and bless you this day and hereafter for a prompt and righteous verdict of Not Guilty.

This was certainly a desperate case when Mr. Shortridge took it in hand. But he secured a prompt verdict of not guilty.

Having noticed this Chinese case with some fullness, it may be necessary for me to say, and I do say with emphasis, that from reading, examination, and experience—not from mere prejudice—Mr. Shortridge is and has shown himself to be an uncompromising opponent of Chinese immigration to our shores. He has on many occasions declared his sentiments on this vital question. Having studied Chinese history, the Chinese race and character, he has opposed Chinese immigration on the broad and justifiable ground of self preservation, the first law of nature, applicable alike to nations and to individuals. He elaborated his views in a speech at Metropolitan Temple, San Francisco, in 1887, when he used these words:

A total abrogation of the Chinese treaty and a closing of our doors to the further coming of this objectionable race are the only effective methods of grappling with this great and dangerous evil. The State as such is powerless; the nation must speak and act. The warfare of Californians against the Chinese is a patriotic and righteous warfare, justified by the principle of self-protection. It is not an unchristian hatred or petty spite which prompts them to act, but an honest conviction that seeks only to protect the interests of American labor.

"We stand here to-day as the Athenian stood, threatened by the advancing hosts of Syria; as the Roman stood, menaced by the Goth and Vandal of the north. Around and about us are the monuments of our Christian and enlightened civilization, the magnificent results of a national progress unparalleled in the history of man, the precious and inestimable blessings of liberty achieved by heroic sacrifice and thus far treasured and preserved by lofty and self-denying patriotism. Shall these blessings be jeopardized and lost forever? Shall these splendid results be sacrificed, these monuments of our liberty, our industry, our progress be ruthlessly overturned? Shall these shrines be desecrated, these oracles of freedom hushed, these free laborers reduced to beggary? It were better that the waves of the ocean overwhelm and swallow us up, it were better that Heaven's lightning smite and wither us than that Chinese slavery should pollute the air of American freedom."

Mr. Shortridge eloquently reviewed the history of Chinese immigration to this country, and graphically described the manner in which the coolies are released in our Federal Courts on habeas corpus proceedings in which parol evidence was admitted. When he closed his remarks the display of enthusiasm on the part of the audience was most marked.

Mr. Shortridge's brother, referred to in this chapter as having worked by his side in the Nevada county mines, is Mr. Charles M. Shortridge, editor and proprietor of the *Mercury* newspaper of San Jose. He is a man of great enterprise, talent, and public spirit. He has been a leading and prosperous journalist for some years, as strong a man in his own chosen field as his brother is at the bar. A warm brotherly feeling has always existed between these gentlemen. Mrs. Clara Shortridge Foltz, the lawyer and accomplished lecturer, is their sister.

It is fitting that some extracts from Mr. Shortridge's public orations should conclude this chapter. In his Memorial Day oration at Fresno, in 1886, he paid to the memory of Abraham Lincoln a most judicious tribute, one of the finest ever spoken. It is as follows:

In the midst of mingled doubts and fears, when weak and timid politicians, masquerading under the name of statesmen, hesitated to grapple with the monstrous evil that had caused so much acrimonious debate, and threatened to advance upon and overwhelm the last remaining bulwarks of freedom, when the right and true part was well-nigh lost sight of, and lovers of liberty were ranged under different banners, waiting for the Moses who was to lead them out of Egyptian bondage—the Great Captain came. He came, and all thenceforth seemed clear. Simple in speech, plain in manner, straightforward in action; tender as a child, bold as a lion, fearless as a hero; at once courageous and humble, lofty and lowly, he came to speak and to act. Born of southern parents who had witnessed the blighting effects of slavery, and reared in the broad prairies of the west, whose very winds sang liberty, he realized the curse of bondage and the blessing of freedom. From the unfelled forest, from the log hut and the little clearing, from the flat-boat and the country store, from humble forum and obscure dwelling, from out the ranks of the people, the leader came. He came, and statesmen bowed before him. He spoke, and a nation hearkened to his counsel. Devoted to truth and the right, opposed to falsehood and the wrong, scorning the tricks and the subterfuges of the self-seeking, and abhorring with his whole heart and soul the mean and base, loving his country with a passion that absorbed all his thoughts, and made him forgetful of all else save the preservation of the Union, the incomparable leader rose. In judicial tribunal and halls of State, in capital and village, in mansion and log cabin, in crowded cities and out on the boundless prairies of the west, men listened to his words and saw, as they had never seen before, the darkness, the light, and the path—the wrong, the right, and the remedy. "You must be either all slave or all free." These were his prophetic words. Who was this man who came unheralded and unknown? Who was this man who rose above the statesmen of his day—who was as earnest as Phillips, as gifted as Baker, more profound than Seward, more learned than Chase, more logical than Douglas, more eloquent than Everett? Who was he that combined in one soul the simplicity of a child, the wisdom of a sage, and the foresight of a prophet? Need I utter his sacred name? Wheresoever among men there is a love for disinterested patriotism and sublime attach-

ment to duty, wheresoever among men liberty is worshipped and loyalty exalted, his name and deeds are known. His image is in all hearts, his name is on all lips. That grand and lofty man was the railsplitter of Illinois, beloved, sainted, immortal Abraham Lincoln, the statesman, philosopher, and patriot, the greatest, noblest, purest soul that ever was enwrapped in clay to walk the earth—Abraham Lincoln, the most precious offering of freedom unto fame—Abraham Lincoln, the Emancipator of a Race.

Mr. Shortridge's Fourth of July oration of 1888, delivered in the Grand Opera House at San Francisco, was pronounced by a leading journal of that city "a marvellously capable effort of rhetoric," and its effect was spoken of as follows :

"The appearance that marked each telling point developed at times into wild enthusiasm. Combined with clarion-clear enunciation were earnestness and power, softened occasionally with touching pathos, and conveyed at all times with appropriate gesture. Mr. Shortridge is a born orator. There are few speakers outside a limited circle who can hold their hearers in perfect symmetry on a popular occasion, as Mr. Shortridge succeeded in doing last evening by his impassioned triumph of eloquence."

I give these extracts from the Oration :

Grateful for the manifold and inestimable blessings we enjoy as children of a free country, and duty mindful of the sacred duties and grave responsibilities resting on us as heirs and guardians of a nation born of a righteous revolution, we come again to-day to reaffirm our devotion, to rededicate and reconsecrate our minds and hearts to the flag and the Union of Washington. Standing in the sunlight of liberty, an example of what a free people led by wise counsel and moved by intelligent and self-denying patriotism can accomplish, we, the children of immortal men and the inheritors of their works and glory, come to celebrate our nation's birth, to rekindle the fires of loyalty in our hearts, to recall and recount the heroic sacrifices and the willing martyrdom of our ancestors, who, upon a hundred fields, in snow and ice, and rain and storm, in heat of noon and chill of night, gallantly strove and grandly died to make this new world of promise, the resting place and home of freedom forever.

A mighty nation, conscious of its strength, proud of its past and hopeful of its future, reposes and rejoices in peace. Business is suspended, the noisy marts of trade are silent, the music of the anvil has died away, the throbbing heart of the engine is at rest, the white-winged sails of commerce are furled, while from all over our ocean-girl and imperial domain—from mansion and cottage, from hamlet and metropolis, from valley and mountain-top—ascends to God, to the heavens that have smiled upon and blessed our cause, the prayers, the gratitude, the exultant, joyful song of sixty million freemen.

All hail to the spirit of independence! All hail to the truest and greatest republic that ever blessed the world! All hail to the land of free thought, free lips, free hands! Rejoice, O sons of men in every clime; rejoice and render thanks! The star of liberty is fixed in the firmament. Its beams chase darkness to the uttermost parts of the earth; its light remains to cheer, to inspire, to lead you up the toilsome ascent from bondage unto freedom.

* * * * *

Above the passions and civil conflicts of the hour, above local interests and party predilections, above the dust and fog that warp our judgment and distort our vision, we rise to-day to a broader plane, a serener height, and stand upon the eminence of

American citizenship; and standing there let us take an honest survey of our surroundings, let us gather up the lessons of the past, consider the dangers and the duties of the present and indulge ourselves in pleasurable anticipation of the glory that awaits us, if we are faithful to our inheritance, true to our mission and equal to our trust.

* * * * *

We have a nation one and indissoluble, a Constitution vindicated and supreme, a nation strong enough to protect the humblest, lowliest man entitled to its care, a nation dear enough to the American heart to call to its defense the sublimest examples of modern patriotism, a Constitution grand and generous enough in scope and design to receive the admiration of mankind and to be a model for all self-governments, a Constitution under whose wise adjustment of powers and divine protection a people of 60,000,000 hearts are marching forward hopefully, proudly, bearing aloft the banner of heaven's stars, and keeping step to the glad, the soul-stirring music of union and liberty. Yes, we have a nation, one supreme nation, not a miserable confederacy of States bound together with ropes of sand—a nation spanning a continent, to be proud of and to be cherished, dearer at this hour because of the sacrifices of precious blood and treasure made in its behalf, stronger and more enduring than the bayonet-supported thrones and monarchies of the Old World. Yes, we have a nation that stands to-day clad in the gorgeous robes of freedom, the wreath of past achievements on her brow, the light of future glory in her eye; a nation beneath whose banner—praise, forever be to immortal and celestial Lincoln—no slave crouches, no human being toils unrequited, no serf wears the degrading, galling yoke of caste; a mighty nation.

Dear for her reputation through the world,
Great, powerful, intelligent, free, the flowering of man's highest aspirations, the hope of the earth.

She has trod the higher paths of fame. For, whatever have been her military triumphs, whatever of great glory has been achieved on the many battle-fields where the stars and stripes were endangered, whatever of imperishable renown is inseparably united with the names of her chosen military chieftans—in the Revolutionary struggle, in the war of 1812, in the brilliant successes in Mexico, in the dark and unhappy days of 1861-65—her greatest, grandest conquests have been those of peace, and her foot-steps have ever led to a higher plane of national life, toward equality, liberty and light. And the story of heroic birth—the unparalleled rapidity of her development, her struggles and triumphs, her sorrows and magnanimity—fills the most illustrious pages in the annals of man, pages over which future generations and a grateful posterity will linger with delight.

* * * * *

Not only do our fathers admonish us, the heroes of a thousand battle-fields where liberty has struggled with tyranny look down to-day from their portals of eternal light and beseech us to be true to the principles in vindication of which they died. Nay, more; from every land made sacred by heroism; from every dungeon of agony and death where truth has suffered on the rack for conscience sake; from the ashes of the martyr and the blood of the patriot; from Marathon and Thermopylæ; from Runnymede and Bannockburn; from the graves of Kosciusko and Hampden; from the scaffolds of Sidney and Emmet, comes a voice urging us to be true to our mission, to guard jealously the citadel of our liberty, and to vindicate by our wisdom and moderation and justice the cause of freedom.

Self-government, fellow-citizens, is no new system, and is subject to the dangers that threaten all organized society. Antiquity, burdened with tears and woe, is strewn with the ruins of republics, and over the fallen, crumbling monuments of ancient liberty grow the moss and trailing vine. Nor is freedom in itself enough; freedom, to be

a blessing, must bring about organized government, law, order, justice, means of defense from without; means of security from within; otherwise, freedom means anarchy, where physical might tramples with impunity upon right, and weakness and innocence fall a prey to strength and avarice.

Let us, therefore, upon this thrice hallowed occasion, when every true and loyal American should seek to promote his country's good, let us bear in mind and cherish this great truth, attested by the experience of ages, that self-government is impossible, yea, undesirable, where ignorance and licentiousness and moral depravity rule; that intelligence, justice to all before the law, and absolute equality of public burdens, can alone preserve to a people its liberty and lead it in the pleasant paths of peace and prosperity. This truth, also, let us bear in our minds and write in our hearts, that liberty without just and equal law, fairly and honestly administered, degenerates into license worse than slavery, into anarchy worse than despotism, and that liberty without intelligence and character can secure no blessings, no permanency, no glory for our beloved country.

* * * * *

In laying the foundation stone of the Constitution under which we live, our fathers builded wiser than they knew. They were animated by no sordid motives, no sectional hatreds, no party animosities. They strove to embody in constitutional form and to perpetuate the principles for which they had fought, and their work was one of lofty and disinterested patriotism, marked by concession and compromise. Under its protection the dreams of the most sanguine patriot have been more than realized. Our infancy is passed, and in the manhood and strength of freedom we invite the scrutiny of the world. We have encountered dangers; we have gone through struggles; we have drunk deep of the bitter cup of national sorrow, but in the darkest hour and wildest storm we have borne aloft as a thing sacred, as the Arc of the Covenant, the Constitution of our fathers, until the returning and radiant morn of peace and promise has blessed and hallowed it.

That Constitution, purged and purified and rededicated, without blot or stain, freed from dishonor and shame, sustained by deathless valor and heroic devotion—that Constitution to which we owe whatever makes us proud of our country, or great or respected among the nations of the earth—that Constitution stands to-day firm-set and strong in the hearts of a patriotic and united people. And, sir, whatever storms may gather, whatever dangers, internal or external, may menace, whatever difficult questions may arise, (as we have cause to believe will arise), calling for profound statesmanship, whatever social problems, charged with restlessness and discontent, may develop and require solution, be assured, be assured, that with the love of the people that Constitution is safe, safe beyond the frantic blow of Communism and Nihilism, safe beyond the mailed and iron hand of Cæsarism!

* * * * *

Fellow-citizens, in spite of the ills and imperfections and burdens necessarily incident to all forms and systems of government, we have abundant cause to rejoice, to give thanks to God, that we are Americans, and are permitted to share in the protection, and glory of that blessed banner. Let the Italian be proud of the land where Cicero spoke and Horatio fought, and in later days the patriot Garibaldi strove for equality and liberty. Let the German love the Rhine and the Frenchman the Seine, and each recount his country's deeds of valor and glory. Let the Switzer exult among his native hills, where Liberty has gathered her children about her, lo, these many centuries. Let the Englishman point with pride to the mighty names that adorn and shed unfading luster on his country, and fondly dwell upon Britain's triumphs on land and sea. Let the Irishman cling affectionately to his own Green Isle—the victim of misrepresentation.

and tyranny, but valiant and undaunted—and glory in her immortal sons, who in poetry, oratory and science, in camp, in forum and on the scaffold, have achieved undying honor for their unhappy country. But let not the children of America, of Columbia, forget that they are the inheritors of heroic and immortal men and women who died for principle, who gave up life for liberty; that they live in a land which, in its short career, has championed every great struggle for human equality and filled the eighteenth and nineteenth centuries with a blaze of true and everlasting glory; a country which has produced and given to the world and fame forever some of nature's grandest and loftiest types of character, some of the greatest though uncrowned noblemen some

“Of the few, the immortal names
That were not born to die.”

Recognizing great worth and exalted virtue, bowing before masterful genius and sublime attachment to duty and country in whatever land it has pleased heaven that they should dignify and uplift the human race, let the children of America on this, the jubilee of liberty, proudly remember that their country has produced men great in all the realms of intellectual activity, great in literature, in scientific pursuits and in the useful arts; great in enlightened charity and in humanitarian philanthropy, great in war and surpassingly great in peace, and great in a comprehensive and far-seeing statemanship that has steadily foreseen and accurately forecast the high destiny of this republic. Let us proudly remember that our annals are covered all over with names that honor the land of their birth and the human race—with inventors, poets, painters; with orators patriots, statesmen. Let us proudly remember that our policy has been upward and onward toward individual freedom, the policy of peace and ultimate righteousness. Let us remember, and as an inspiration to youth recall, that America has lifted up the fallen, dignified labor and crowned honest toil with the highest honors. Let us remember that she has not only preserved liberty of conscience and of speech; that she has not only opened wide the door of preferment to the deserving ambitious; that she has not only taught great political truths and exemplified principles all-important to the happiness of man; that she has not only enriched the intellectual and material world; but that she has stood and now stands calm, hopeful, puissant, an example and an inspiration to all the struggling, aspiring and liberty-loving sons of men. Sir, this and more America has done; this and more she is; and her future holds in store triumphs and glory, unequaled by her own marvelous past.

We are marching forward with gigantic steps. Bright and dazzling visions of future glory cheer us. The eye of the world is upon us; the hope of mankind in our keeping. Wheresoever there is a bleeding heart, a broken spirit; wheresoever man, heavy-burdened, bends beneath despotic power, gropes in darkness, pines for liberty; wheresoever among men the name and fame of Washington have penetrated, ascends to-day a prayer for us, for us and for our children. Heaven has blessed us with a land of seemingly inexhaustible resources; a wise, patriotic and far-seeing policy will preserve, strengthen and adorn, not squander, this rich heritage of freedom. Our cause is peace—peace at home, peace with all nations, but not peace at the sacrifice of national dignity or honor, not peace without protection in all his rights to the poorest, lowliest citizen who seeks the shelter of that banner wherever it waves. Great problems of government, of administration, involving the proper development and preservation of our natural resources, the judicious fostering and encouragement of our already varied industries, the prosperity and happiness and, perhaps, the stability and perpetuity of our country, are pressing upon us. Oh, let us not fail! Let not the struggles of our ancestors be in vain! Let not the holy cause of freedom suffer in our hands! Oh, let not the sacred

shades of the immortal dead censure us, let not the sad lips of a disinherited posterity reproach us, for dereliction of our high duty to God, to truth, and to country! Rather let it be proclaimed in distant ages: They excelled their fathers in love of liberty and fidelity to the Constitution and transmitted to grateful children the flag and the Union of Washington.

* * * * *

No, my countrymen, patriotism is not dead. The mighty voices of other and heroic times are heard to-day; the glad music of old Independence Bell is still ringing; the cannon of Lexington and Bunker Hill reverberate through the land. The anxious eye, the heaving breast, the universal joy, the myriad quivering lips that make the vault of Heaven vocal with songs of praise, all, all attest that patriotism neither slumbers nor grows cold in the American heart.

Again, all hail to the spirit of Independence! to the heroes of '76,² to the fixed and everlasting star of hope placed in the Western sky!

—Yes, yes, intrepid and venerated Adams, you and your illustrious compatriots did make the Fourth day of July "a glorious, an immortal day." We do "celebrate it with thanksgiving, with festivity, with bonfires and illuminations." We do "shed tears, copious, gushing tears, not of subjection and slavery, not of agony and distress, but of exultation, of gratitude and of joy." And as long as the heavens bend above the earth; as long as the sun in his sinking burnishes yonder waves with crimson gold; as long as man has aspirations for light and liberty and rejoices in the works of peace and virtue; as long as there shall survive an American heart to beat to the transports of a pure and lofty patriotism or to reverently approach a temple where your names shall be enshrined, so long may the Declaration you made be revered; so long may the flag you raised to the sky float over a united, a happy, a righteous people; so long may the Constitution you framed be held sacred; so long may the Union you founded be cherished and remain, under God, uncorrupted, unshaken, indissoluble, the home and refuge of Freedom forever!

CHAPTER XLI.

William H. Jordan—Working on a California Farm—A Struggle for Education—Student and Janitor in the Same School—Two Years at Yale—Business Career in Oakland—Unique Preparation for the Bar—Weed of the Ancient Order of United Workmen—Speaker of the Assembly—A Political Crisis—His First Case with Pat Reddy.

For some years before Mr. Jordan had well established himself at the bar, his had become a very familiar name throughout the State. It was because he stood first in rank and first in the heart of that flourishing fraternal brotherhood, the Ancient Order of United Workmen, under whose wide shelter so many thousands of homes rest secure. Since he has been at the bar he has become still more generally known, owing not only to his prominence in that sphere, but to his part in politics and legislation; while in the chair of Speaker of the Assembly, his tall figure is seen as one of the most notable in the line of those who have held that station.

Mr. Jordan was born in Cincinnati, Ohio, on the 3rd of September, 1849. His father was a carpenter and farmer. The family has been in America since 1630, when its progenitor in this country, Robert Jordan, a clergyman of the church of England, settled in Portland, Maine. Mr. Jordan came with his father and family to California in 1859, driving an ox team across the plains, and walking most of the journey. They settled on the Sacramento River near Red Bluff, and our friend, then ten years old, passed his first winter in the State in driving an ox team with lumber to a point on the river for shipment. The great flood of the winter following (1860-61) destroyed his father's property. His mother, too, had died, and father and son removed to San Jose. The boy there began making his own way in life, setting out alone in quest of the employment most familiar to him; he found it on a farm near Pescadero. After a few years, when he became fifteen, he went to Oakland with the purpose of getting an education.

His picture at this point in life might be taken as a striking illustration of the beauty of our free institutions. The path to good fortune was open to the poor, friendless lad.

He had accumulated by his work on the farm \$185.00—a comfortable sum to have in pocket just then, but he must still work with his hands if he would improve his mind. He soon effected the necessary conditions. Getting the place of janitor in the Brayton school, and that of sexton in the First Congregational church, he entered the first-named institution as a student. He had been there about one year when he resolved to make an effort

to enter the State University, which was then just being put into working order on its permanent site at Berkeley. When he presented himself there he heard the regents discussing a proposition to charge students an annual fee of \$100.00. There was a division of sentiment, and one regent declared his opinion that any young man who could not afford to pay \$100 a year for an education was not worth educating. This cut our young friend, for he really could not afford to pay the sum. But just then, while his application was pending, he was, through the kind intervention of a friend, invited by a benevolent gentleman of Norwich, Connecticut, to go thither and live, and attend the Free Academy there. Accepting the offer, he attended that academy for one year. He then entered Yale college. This was in 1871. Mr. Jordan remained at Yale but two years, so that his education, as far as systematic study in the schools is concerned, is comprehended in two years at Brayton in Oakland, a year at the Norwich Free Academy, and a year at Yale. His withdrawal from Yale was enforced by failing health, and it may be said in this connection that Mr. Jordan, from that time down to almost the immediate present, was subject to severe pain in his eyes, so intense at frequent times as to be next to intolerable. It was only in the summer of 1889 that he found in electricity a relief that was instant and that promises to be permanent.

Returning to California in the fall of 1873, Mr. Jordan went into business at Oakland, organizing and managing the Real Estate Union there, and afterwards the Oakland Woolen Mills. Then, as before, his character and conduct were marked by the sure foretokens of success. The influence he exerted and the confidence he inspired were evidenced in many ways. His relations with the public spirited capitalist, Mr. Antony Chabot, were such that he obtained from that gentleman the donation for the Astronomical Observatory, and under a commission from Mr. Chabot, he visited the eastern States and secured the glasses for the telescope, an eight-inch refractor made by Clark. He is still an associate director of the management of this observatory. He was twice elected a member of the Board of Education of the city of Oakland, and served as such for four years, 1881-85. His business career in Oakland was prosperous, but investing his accumulations in vineyards for wine growing, then the most promising industry, the failure in prices, which began about May, 1885, brought a total loss. He had planted vines on a large scale, and had mortgaged his fine property in order to bring it to a condition highly productive. He was not able to meet the crisis, and lost his lands under a foreclosure suit. His failure in this line seemed to be the Nemesis to his success in politics, for the process in the foreclosure suit was served upon him while in the chair of Speaker of the Assembly.

Mr. Jordan was first elected to the Assembly from Alameda county, in the fall of 1884. Two years later he was re-elected, and was chosen Speaker.

He was the unanimous choice of the Republican caucus, and was elected Speaker by a majority of one vote, that being the strength of his party in the House, and he presided much of the season over a Democratic body. By virtue of his office of Speaker, he was required to open the returns and declare the result of the popular vote for Governor and Lieutenant Governor, cast at the general election two months before. While he was in the act of discharging this duty in the presence of the two houses of the legislature, he found that there were no returns from two of the counties. He accordingly refused to declare the result.

In this emergency the circumstances were such that the Speaker's position was vexatious if not perilous. The governor elect was a Democrat, and the Speaker a Republican. The former, Washington Bartlett, who afterwards died in the office, had defeated Hon. John F. Swift by the slender plurality of 659 out of a total vote of 195,000. The two houses of the legislature were now in joint convention to hear the Speaker announce the result officially. All things were in readiness for the inauguration of the Governor elect. There was to be a military display; Democratic clubs, in uniform, from San Francisco, were present. The Third Regiment of the National Guard of California, which was in attendance, was Democratic.

Beside the Speaker, at this juncture, sat, on one hand, the retiring Governor of the State, Gen. Stoneman, and on the other hand the retiring Lieutenant-Governor, Hon. John Daggett. Both of them were Democrats. The Speaker asked Mr. Daggett what the latter would do under the circumstances. Mr. Daggett said that as the vote of the two counties not officially reported was well known, and did not affect the total vote cast, the Speaker ought to declare Governor Bartlett elected according to the returns before him. The Speaker then asked Governor Stoneman what he would do. The Governor said "you had better declare the result now. I fear there will be trouble if you do not."

But the Speaker intimated to the assembled wisdom before him that he would not then declare the result. A Democratic Senator had quickly procured copies of returns from the office of the Secretary of State, and moved that these be counted in place of those required to be forwarded to the Speaker. A Republican Senator made objection to this course, and a heated discussion ensued. To put a limit to this, the Speaker announced while it was progressing that he would hear remarks from only two more gentlemen, and when these had spoken he addressed the Houses as follows:

Gentlemen of the Convention: I have permitted this discussion to proceed at far greater length, and to assume a much broader range, than the strict letter of parliamentary law would permit. This I have done that the Senators and Assemblymen might have the fullest opportunity to give expression to individual views, and offer to the chair the wisest and best chosen counsel. The first question for me to decide is that upon

the returns. The Code provides two channels through which the Speaker is to receive returns of the election of Governor and Lieutenant-Governor—one by a copy of the returns sent to him through the mail, and the other by the copy sent to him through the hands of an Assemblyman or Senator. These are the only channels provided by law through which the returns of elections are to come into the possession of the Speaker, and I shall, therefore, be obliged to sustain the objection and rule the motion of the Senator from Los Angeles out of order. The question now remaining for me to decide is as to whether I am authorized to announce the result of the late election from the returns now before me. It is my judgment that the duty of the Speaker in this matter is purely ministerial, and that I have no right to vary from the law as I find it in the constitution and codes. The constitution provides that the Speaker shall open and publish the returns of the election. Had it been the intention of the framers of that instrument that the Speaker should canvass such returns as might be in his hands at the convening of the joint convention, it would doubtless have so stated, but when, having so failed to state, it says that the returns shall be opened and published, I shall assume that it means the returns from *all* the counties of the State, and that I, as Speaker of the House, have no more right to canvass the returns of all the counties *but three* and announce the result of the election for Governor and Lieutenant Governor, as shown by them, than I would have to canvass the returns of but one county, and announce the result to be shown by that. It is therefore the ruling of the chair that inasmuch as there are no returns whatever before me from the counties of San Benito and San Mateo, and no returns as to the vote for Lieutenant Governor from the county of Merced, I cannot, as Speaker of the House, conclude the canvass of the votes at this time, nor declare to the convention the result of the recent election for the Governor and Lieutenant Governor of this State. It will be observed that the constitution provides that the duty of canvassing the vote and declaring the result devolves upon the Speaker of the House during the first week of the session. The week is not yet at an end, and as the missing returns may reach me before Saturday night, I would suggest that a recess be now taken until such time as may suit your convenience.

The result was the orderly inauguration of Gov. Bartlett a few days later, after all the returns had been received.

I will not linger upon Mr. Jordan's record as Speaker. He maintained himself through the session with great dignity and capacity, there being no whisper against the correctness of his rulings. It fell to him at one time to publicly reprimand one of the Assembly clerks for attempting to alter the position of bills upon the file. This he did by order of the House, and with excellent judgment. At the close of the session, the members, as a delicate mark of their personal esteem for him, presented his wife with a magnificent pair of solitaire diamond earrings, and himself with a magnificent solid silver tea service.

By virtue of his office of Speaker, Mr. Jordan held a seat in the Board of Regents of the State University for the years 1887-88. I have heard him speak of the thought that was uppermost in his mind when he first sat in that learned body. What was it? It was of the remark made, some sixteen years before, by a Regent in whose seat Mr. Jordan now rested, that a

young man who could not afford to pay \$100 a year for an education was not worth educating.

Mr. Jordan was the first Grand Master Workman of the A. O. U. W. in California, and held the office a second term. During his administration the membership grew from 300 to 9000. He was Supreme Master Workman of this great Order for the year 1888, the jurisdiction extending over the United States and Canada. He then made a protracted tour of both countries in the interest of the Order named, and witnessed an increase of 34,000 in the general membership in the year of his occupancy of the supreme office.

It was while returning from this circuit of visitation, and at Cincinnati, in 1888, that he learned that the faculty of Yale College had just given him the degree of Master of Arts. His two years at Yale did not entitle him to this distinction, under the rules, but it had been conferred upon him at the request of his class.

The story is unique concerning Mr. Jordan's preparation for the bar, and his entry on the duties of the profession.

He was very young when he "wanted to be a lawyer." He began the study in his time of manual toil, in boyhood, on the farm near Pescadero. He read law books at night, in his own way, without tutor, advice or suggestion, and pursued the study through his years of work and the after period of school and college, as opportunity offered. Still prosecuting his purpose through his short business career in Oakland, it was in May, 1885, that he presented himself before the Supreme Court at Sacramento for examination, in a class of applicants from different parts of the State. To facilitate the examination the class was thrown into two divisions, and questioned in different departments of the Court. Mr. Jordan answered every question put to him, and was the first one in his division admitted to practice.

He opened an office in San Francisco a few weeks later, on July 6th, 1885, but maintained his residence in Oakland. He had never seen a case tried. His first introduction to a court room was on the trial of the murder case of the People vs. Cassidy, which occurred in Oakland in 1885. In that case he appeared as special counsel for the prosecution. The well known advocate, Patrick Reddy, was associated with him in the trial, and he fully expected that experienced hand to take the laboring oar. He told Mr. Reddy of his embarrassment, but Reddy would not let him off. When he saw there was no escape, he stood up bravely to his work. "Reddy, you are a good fellow," said the tyro to the veteran, "but you've got no soul."

"You might as well begin *now*—never a better opportunity," replied Reddy.

Mr. Jordan was well grounded, however, and had been used for years to public speaking. He managed the case to Mr. Reddy's complete satisfaction, and made a fine address to the jury. All that was thought possible

was accomplished—the accused was convicted of murder in the second degree, and sentenced to the State prison for twenty years.

Mr. Jordan's period at the bar, though not long as yet, has been very prosperous. He has, from the accumulations of his practice, fully retrieved his severe business losses. Beginning alone, he was soon joined by Mr. Franklin P. Bull, a lawyer universally esteemed for his professional talents and fine personal qualities. The firm of Jordan & Bull holds a rich clientage, which embraces nearly all the large lumber interests, such as the San Francisco Lumber Company, the Puget Sound Lumber Company, the San Joaquin Lumber Company, Hanson & Co., and Renton Holmes & Co., also several other large corporations and private capitalists.

CHAPTER XLII.

P. D. Wigginton, Head of the New American Party—The Case of Breckinridge vs. Crocker—Hon. John W. Armstrong, Superior Judge of Sacramento: A Clever Jury Art Learned From James T. Farley—Theodore H. Hittell, the Land Lawyer and Historian—Hon. George Flourney, Jr., Attorney for the City of San Francisco—Joseph Rothschild, Another of Our "Native Sons."

"My boys shall be farmers," declared Mr. Wigginton once, in a public address to the farmers of the great San Joaquin Valley.

He was evidently sincere, but his boys have something to say on the subject, and their father's precept may be negatived by his example. Quite possibly his mature triumphs may challenge their minds more than his earliest struggles—the boy on the farm less than the strong man of the forum. It would be very natural.

Mr. Wigginton might also address a convocation of bankers on the subject of that line of business, for he has had experience there; and he could, as well, hold forth to an assembly of editors on his acquaintance with journalism, for I heard him once, in a political speech, read one of his own editorials from an Illinois paper, the publication being in 1861, I believe. As to politics, of course he has always been full of the theme. But after all his varied experience, the law, which was his first love, is nearest his heart still, and California, knowing him so long, knows him as a lawyer best.

Mr. Wigginton was born in Springfield, Illinois, on the 6th of September, 1839. The head of the new American political party appropriately springs from one of the oldest American families, his ancestors having settled about Jamestown, Virginia, in the year 1620. His grandfather was one of the pioneers of Kentucky, dying in 1840, when our subject was but a year old. The mother removed, with her seven children, to Wisconsin, where she married again. Young Wigginton was taken in charge by Hon. Robert Wilson, County Judge of Iowa County, Wisconsin, who had married his sister, and who sent him to the State University at Madison. Graduating therefrom, the young man began the study of the law at that place, in the office of Hon. L. M. Strong. He was admitted to the bar there on the 18th of February, 1860. The exciting Presidential election of that year arrayed him on the side of Stephen A. Douglas, in whose behalf he spoke on the stump in many places. He was then twenty-one years of age. In that campaign he also wrote many articles which appeared in the political press. After about two years' practice of law in Wisconsin Mr. Wigginton, in May,

1862, removed to Oregon, where, as a miner in the Salmon River mines, he had the experience common to so many of my subjects early in life. As a gold miner he explored also Idaho Territory and British Columbia. All his adventures in this field were comprised within a period of six months, for turning to California, he arrived at San Francisco on the 15th of October, 1862. Proceeding at once to Merced County, he began the practice of law. In the following year he was elected District Attorney of that county, and being re-elected, served a second term. Declining to hold that office further, he followed his profession thereafter for about ten years, taking a leading place at the bar of that section. It was during this period that he, for a short time, also engaged in the business of banking.

In 1865 Mr. Wigginton planted with his own hands, on his own land, one of the best orchards now growing in Merced County.

In June, 1875, Mr. Wigginton was nominated by the Democrats of his district for Congress, and was elected. Two years later he was again the candidate of his party, against Hon. R. Pacheco, who had been Governor of the State. The popular vote then was practically a tie between these gentlemen, Gov. Pacheco being declared elected by a majority of one. Mr. Wigginton, after a careful canvass of all the returns, was satisfied that there was a positive although slight majority for himself. He made a contest, and the House of Representatives awarded the seat to him, finding that he had received a majority of six votes.

In 1886 Mr. Wigginton was the candidate of the new American party for Governor of California, and in 1888 he was the candidate of that party for Vice-President of the United States. In the gubernatorial contest he made a brilliant canvass of the State. He never displayed such enthusiasm or such power of utterance as when vindicating the tenets of the new political organization—the unconditional repeal of our naturalization laws, and the exclusion of alien non-residents from the ownership of land.

It is to be said in this connection that Mr. Wigginton's voice is clear, resonant, and of great power. Probably no other speaker's utterance has ever been so distinctly heard in the large halls, including the Mechanics' Pavilion, of San Francisco. He is very fluent of speech, earnest in manner, of fine presence, and strong physique. Ready in reply, and possessing, too, great moral stamina, he exerts a commanding influence whether before court or jury, or the populace. He is a splendidly equipped man to lead a popular movement.

Mr. Wigginton removed to San Francisco in 1880, and formed a partnership with Nathaniel Bennett, who had been one of the early day Justices of our Supreme Court. This lasted until Judge Bennett's death, in April, 1886. He has always, however, maintained a large country practice, and no other lawyer of San Francisco is so frequently called to by cases in the

interior. He was prominent on the side of the irrigators, in the great water litigation in the San Joaquin Valley, and is the attorney for the Southern Pacific Company in all cases arising in Central California.

Perhaps the most interesting of these cases was that of J. W. Breckinridge vs. Charles Crocker, tried at Merced, in 1884, and finally decided by the Supreme Court in March, 1886. The plaintiff was District Attorney of Merced county, and as such was, in July, 1883, pressing the payment of taxes on Merced town property owned by Mr. Crocker. The latter had appeared by his agent before the county board of equalization, and asked that his assessment be reduced from \$96,000 to \$65,000. The agent said he was authorized to sell the property to any one who would take it at the last named sum. Mr. Breckinridge accepted the offer, on the condition that time should be given him for payment. It was agreed between him and the agent that he should have the property for \$70,000, of which \$5,000 was to be paid the next Tuesday, and the balance in thirty days. The agent was to telegraph Mr. Crocker for instructions and did so, and Mr. Crocker wired back from San Francisco: "Accept the seventy thousand dollars offer for Merced property." On the Tuesday following Mr. Breckinridge proceeded to San Francisco, waited on Mr. Crocker and said he had come to make the first payment on the Merced property. Mr. Crocker referred him to the agent, remarking that there had been a mistake.

Mr. Breckinridge was not able to find the agent until next day, when he tendered the \$5,000. The agent replied that he could not receive the money, and that he had been instructed by Mr. Crocker to decline any tender, on the grounds—first, that there was no contract, and, second, that the tender was not made in time. All negotiations then ceased, and Mr. Breckinridge brought suit in the Superior Court of Merced County against Mr. Crocker, to recover damages in the sum of \$200,000.

This would not seem to be an easy case for Mr. Wigginton, as attorney for the defendant, to win. The code provides that no agreement for the sale of real property is valid, unless the same, or some note or memorandum thereof be in writing, and subscribed by the party to be charged, or his agent thereunto authorized in writing. In this case the evidence of the contract was in the telegrams. The Superior Court (Hon. Charles H. Marks, Judge) held that these did not show such a contract as could be enforced by the Courts. On appeal to the Supreme Court, the case came first before the Supreme Court Commissioners, Hons. Isaac S. Belcher, Robert Y. Hayne, and Henry S. Foote. It was held (the last named commissioner taking no part in the decision) that it could not be ascertained from the telegrams "who the buyer was."

Mr. Crocker, as before stated, had claimed that there had been "a mistake." The telegram from his agent had announced an offer "for balance

of Merced town property," and his reply was to "accept the offer for Merced property." There were two maps of Mr. Crocker's property at Merced. One, the larger, was headed "Town of Merced," and was not of record. The other, recorded, was of 100 blocks, and headed, "Official Map, Town of Merced." It was proven that the value of the 100 blocks was greater than the sum offered, and the value of the property shown in the larger map was more than twice the sum offered. The Supreme Court Commission said there probably was a misunderstanding, as Mr. Breckinridge claimed that the offer and acceptance comprehended the whole property on the larger map. It was decided that the contract was left uncertain in this particular, and was to be regarded as inchoate. The Supreme Court endorsed this view of the Commission, and affirmed the judgment of the Superior Court of Merced County. Chief Justice Beatty, however, filed a dissenting opinion, in which Justice Thornton concurred.

Judge L. D. McKisick (who is the subject of Chapter xxxvii) was associated with Mr. Wigginton in this victory, and with him made the points that were sustained.

HON. JOHN W. ARMSTRONG, Superior Judge of Sacramento County, was born in Indiana on the 12th of May, 1834. When he was but nine years old his father died, the family having removed to Missouri several years before. It was a large family, and largely dependent on what the boy could earn. He was a cripple, too, from rheumatism, and has always been so.

It would seem, then, that life did not open up to him auspiciously, by any means. The boy took up a severe employment, that of the blacksmith. His mother shortly died, and he served an apprenticeship in a large firm of blacksmiths and plow makers at St. Joseph, Missouri, which he completed in the summer of 1850. His mother had taught him the alphabet, and now at night he pursued primary studies under Tom Thurman, a law student, a near relative of the Ohio statesman. With Thurman's help the young blacksmith became a good grammarian and made creditable progress in Latin.

After working at his trade, as a journeyman, for a year, the young man set out across the plains for California. It was in March, 1852, and his money amounted to ten dollars. He drove cattle across the plains for his board, being furnished a mule to ride. In his pocket he carried a Latin dictionary. The arduous journey ended at Sacramento September 20, 1852, and the young man, then only eighteen, went to work at that place, at the corner of Sixth and K streets, making plows. There are prominent men still living in the Capital city who knew him then and saw him at his forge.

The great flood of 1852 drove him to San Francisco, where he shod horses at the wharves. While thus engaged, one day he saw a lady walking on the street near by whom he recognized as his own sister. She had come to California long before the gold hunters, in 1844, but he was ignorant of her location or as to her being alive. She held by the hand a little boy, our young blacksmith's nephew, who now for many years has been librarian of the State library—Mr. Talbot H. Wallis. The lady thus unexpectedly met was Mrs. Montgomery, who is still living, the wife of Joseph S. Wallis of Mayfield, Santa Clara County, a lawyer of ability and high character.

Mrs. Montgomery was well circumstanced, and supplied the young man with funds to attend the University at Santa Clara. He was a student in that institution from March 9, 1853, until June 1, 1854. Among his associates of the same class was Hon. Thomas H. Laine.

In 1854, on leaving the University, Mr. Armstrong commenced the study of law in San Francisco. He pursued it successively, under William H. Rhodes (Caxton) F. A. Fabens and Oscar L. Shafter, and was admitted to the bar by the Supreme Court in November, 1855. He followed the practice at San Francisco, in partnership with W. H. Culver, until the Spring of 1857, when he removed to Amador County.

In that county Mr. Armstrong first went to work in the mines, but after eight months of that life took up law practice again. He found "a friend in need" in the Hon. A. C. Brown, who was then retired from the bar, but who has since returned to the profession, and who has been County Judge. Judge W. W. Cope, Judge J. F. Hubbard, Hon. S. B. Axtell and Hon. James T. Farley were then the leaders of the bar at Jackson. Mr. Armstrong was invited into partnership by Mr. Farley, and they practiced together from the spring of 1859 to the spring of 1866.

In the latter year Mr. Armstrong removed from Jackson to Sacramento. Signal successes and honors were in store for him there. At the bar of the Capital he soon became prominent. For about two years he was in partnership with Hon. John K. Alexander, now Superior Judge of Monterey. For a like period he was associated with Hon. John T. Carey, since U. S. District Attorney at San Francisco. He had a third and longer union at Sacramento, with Mr. Addison C. Hinkson, who had been a law student in his office in Jackson. He has also, since settling at Sacramento, been elected by the legislature a trustee of the State Library three times in succession, and served as such for twelve years.

It was in Sacramento that our subject won his judicial honors and reputation. The first official act of Gov. Stoneman and the last official act of that executive were appointments of Judge Armstrong to the bench of the Sacramento Superior Court. The first appointment was on the 15th of February, 1883, to fill the vacancy left by the death of Judge R. C. Clark.

The appointee served until January, 1885, having in the fall of 1884 been defeated for the same office by Hon. W. C. Van Fleet, the Republican candidate. In that election Blaine carried the county for President by a majority of 1704, while Judge Armstrong was defeated by only 586. In December, 1886 Judge Armstrong was again commissioned to the Superior Court bench of Sacramento by Gov. Stoneman, in place of Hon. T. B. McFarland, who has been elected a justice of the Supreme Court. At the next general election in November, 1888, he was elected his own successor, to serve out the term ending December 31, 1890.

The case of the People vs. Robert Rae, is among the more interesting of those passed on by Judge Armstrong since he came to the bench. The defendant and a co-conspirator had induced a man who was just starting from Sacramento for Boston to lend them a sum of money from his pocket-book, on the promise of return of the loan as soon as the bank opened that day, he believing them, from their representations, to be men of means. Rae was apprehended and indicted for grand larceny. His counsel made the point that the offense was not larceny, but obtaining money under false pretenses, the party defrauded having himself handed his money to the defendant. Judge Armstrong held that the circumstances made the crime grand larceny. He was fully sustained by the Supreme Court (66 Cal. 423), which declared that "when, by means of fraud, conspiracy, or artifice, possession of property is obtained with felonious intent, and the title still remains in the owner, the crime is larceny; but if the title as well as possession is parted with, the crime is that of obtaining money by false pretenses."

While laying no claim to oratory, Judge Armstrong was very successful as an advocate, and he attributes this in large measure to a lesson taught him by James T. Farley, when they were associated in practice at Jackson. Farley was himself no orator, but was very strong before juries, and his chief art was in making the impression that *he* was *the* man of the case. To this end he refrained from replying to opposing counsel, and would not discuss their points as being *their* points at all. Such points he would discuss, but he discussed them as if they originally occurred to him. He seemed not to know any lawyer in the case but himself.

Judge Armstrong married while practicing at Jackson. His wife is a sister of Mr. Addison C. Hinkson, a well-known lawyer formerly of Jackson, now of Sacramento. The judge is a man of pleasant manners, of handsome and striking countenance, and in spite of his lameness from rheumatism is in vigorous physical health. He cherishes a paramount affection for Sacramento and its people, and in turn holds a firm place in the popular heart.

When my eye turned to THEODORE H. HITTELL, the San Francisco lawyer so long prominent in land matters and in literary circles, I came upon an interesting notice of him that his publishers had issued some years before, in connection with his "History of California." The notice itself had never been incorporated in any volume, nor been given to the press, so I asked and received permission to run it into one of these chapters of "Bench and Bar." It is as follows :

Theodore Henry Hittell, the author of the "History of California," was born in Lancaster County, Pennsylvania, in 1830. His father and mother were both Pennsylvanians, the former a native of Lehigh County, and the latter of Lebanon County. His father was a physician and surgeon by profession. In 1832 the family moved west and settled in Butler County, Ohio. It was there, in the shire-town of Hamilton, on the banks of the great Miami River, that Theodore passed his boyhood. He had two brothers and two sisters. Both brothers, an older and a younger one, preceded him to California. The younger died at San Francisco in 1872; the older is the well-known John Shertzer Hittell, author of the "Resources of California," "A Short History of Culture," "A History of San Francisco," and many other books, pamphlets, magazine, and newspaper articles. The sisters are both living in Lebanon, Pennsylvania, the older unmarried, the younger the wife of the Hon. John W. Killinger, who for four or five terms represented his district in Congress. The father died at Lebanon in 1878, aged 81; the mother still survives, a lively, active old lady of nearly 90.

Theodore, the second son of the family—not counting two who died in infancy—was sent to the public school of Hamilton at the age of 6, and continued there until about 14, when he was put under private instructors and prepared for college. In 1845, at 15, he entered Miami University, Ohio; remained there two years and a half; then went for 6 months to Center College, Kentucky, and from there proceeded to Yale College, Connecticut, where he entered senior and graduated in 1849.

At college he acquired or developed a great taste for reading, and spent most of his time in the libraries. He became, so to speak, a devourer of books. His special favorite was Carlyle—at a time when very few men in America appreciated that extraordinary writer. His admiration and enthusiasm for the "Sage of Chelsea" were so marked and so exceptional that at Miami University he obtained the nickname of "Carlyle," which was occasionally varied into "Von Goethe Carlyle," and finally settled down into "The Von." In the games and sports of the day—and he was always ready for a "lark"—if any one cried out, "Here comes the Von," or, "Where is the Von?" it was perfectly well understood by every body who was meant.

In 1850, after finishing his college course and returning home, he commenced reading law in the office of Charles Fox, at Cincinnati. Judge Fox was one of the ablest lawyers at the bar of Ohio, and did an immense business. Shortly after entering the office, Theodore obtained a commission as notary public, and, while studying, made money enough by taking affidavits, acknowledgments, and depositions to support himself with very little assistance from home. At the same time he read through a large library of law books, going over the best of them, such as Blackstone, Sir William Jones, Feane, Kent, and a few others a number of times.

In 1852 he was admitted to the bar and opened an office in Hamilton, Ohio, where he remained until 1855. Business started brisk enough, but it was neither remunerative nor agreeable enough for him. After a few years, having in the meanwhile read a few medical works and dabbled some in literature, he resolved to give up the practice of

law, and, as his father had done before him, "move west." His brother John had already been in California for upwards of five years; and Theodore made up his mind to follow him. His proposition was to go into the mines and dig for gold. Accordingly, providing himself with "hickory shirts" and rough clothing, he set out, by the way of New York and Panama, and in October, 1855, landed at San Francisco.

Almost immediately upon reaching California, he became "enamored of the country" and determined to make it his future home. Soon after landing and while making inquiries about the mines, he was offered a position as reporter on a newspaper, which he promptly accepted and in a short time worked into journalism. In the course of a few months he was engaged by James King of William as assistant editor of the San Francisco *Evening Bulletin*, and remained connected with that journal for upwards of five years. In 1858 he married; in 1859 bought real estate and built a dwelling house, and since that time he has been a man of family, house-holder, property owner, and tax-payer of San Francisco.

In 1861 various reasons induced him to return to his original profession of the law, and, after spending a year in renewed study, he entered into partnership with Elisha Cook. This connection lasted till about 1865, when he took charge of the office and business of Alfred Rix, who had been elected to the bench. In 1867 he formed a connection with John B. Felton, which lasted until Mr. Felton's death in 1878; since which time he has been doing business alone. He has three children—one, a daughter, who graduated with the highest honors at the University of California in 1882; one, a son, who is studying art at the Royal Academy at Munich, in Germany, and the third, a son, who is attending the San Francisco High School. Mrs. Hittell is well, widely, and favorably known as the great advocate for silk culture on the Pacific Coast.

The first book written by our author was "The Adventures of James Capen Adams, Mountaineer and Grizzly-Bear Hunter of California," which was published by Crosby, Nichols, Lee & Co., of Boston in 1860. It was a great success as a literary work and has been extensively read all over the country. His next book was "The General Laws of California," more generally known as "Hittell's Digest," which was published in two large volumes in 1865. It at once became the standard authority on the statutes of California, and was the most successful law book ever published west of the Rocky Mountains. In 1868 he published a pocket edition of the "Civil Practice Act of California," which was the first attempt in the country of a pocket edition of a law book—the model in fact, upon which the numerous subsequent publications of that kind upon the Pacific Coast have all been constructed. In 1870 he made the novel experiment of bringing out in print his "Goethe's Faust," a critical review of the great German poet's master-piece. Though the number of those specially interested in such a subject was limited, the work had a wide circulation, and demonstrated to scholars throughout the country that German literature was studied and appreciated in California, as well as in the Atlantic States and Europe. Between 1868 and 1874 he edited and published 6 volumes of the reports of the Supreme Court of Nevada. In 1876 he published another large law book—which also became standard authority in the courts—entitled "Hittell's Codes and Statutes of California," and in 1880 a supplement to the same work.

In 1879 he was elected from his district in San Francisco to the State Senate, and served during the 3 years of Governor Perkins' administration. In the legislature he was recognized as a most constant and laborious worker. Much the greater part of the Statutes of 1880 is his work. Among other things, he redrafted the entire Code of Civil Procedure so as to make it fit the new constitution. On account of his familiarity with

and sedulous care over the statutes, he was familiarly known in Sacramento as the "Father of the Codes."

About 1870 he commenced gathering the materials for his "History of California," and read all the books upon the subject he could find. But he soon discovered that little or nothing of real historic value existed in print in reference to any of the interesting and important periods between 1784 and 1846. The names of the old Spanish and Mexican Governors were known and were usually printed in a list, with the years of their administrations; but that was all. There was no information as to their characters, the powers they wielded or what took place during their terms. So of the old missionaries and their relations to the country, comparatively nothing was known—even their names were not given except in a few instances. The dates of the foundation of the missions were printed in a list like the names of the governors; but no information was furnished as to the circumstances which led to their establishment, or the story of their progress and final destruction. The only place in the country to find out any thing of value to supply the missing period—if, indeed, it could be found there—was the collection of old Spanish manuscripts, known as the "California Archives," which had been collected by the American military authorities in 1846, and were preserved in the office of the United States Surveyor-General for California. These tremendous piles of matter our author accordingly attacked. There were upwards of 250,000 pages of them, and every page was scanned, and the important substance copied. It required several years of work to go through them all; but the labor was finally accomplished—and accomplished by the author alone, without the help of clerk, assistant, or amanuensis. Every word of his voluminous notes, Spanish, German, and French as well as English, are in his own hand writing.

After gathering up and arranging all the extracts he was thus enabled to collect—and he was gratified with frequent surprises as he pored over the old sheets—he found that he had a very interesting mass of valuable matter. Some papers were missing and their loss cannot be supplied; but those that were left were sufficiently complete to construct a reliable narrative of all the important events that had occurred in California. He proceeded to carefully cull out everything that was of sufficient interest to be preserved, and with an unsparing hand lopped off and cast aside the superfluous matter. At the same time he looked around on every side for further information, and availed himself of transcripts of testimony in old law-suits, legal records, government documents, conversations with old residents, personal observations, and, in fact, of every source within his reach to add to and elucidate what he had gleaned from the archives. When he came to write out the results of his various labors, he did so, as he had previously gathered his material, with his own hands. The manuscript he placed in the hands of the printers consisted of about 3,000 legal-cap pages, every word of which is his own chirography.

In the course of the fifteen years, during which it may be said the work was going on, the author was also engaged in various important law-suits and law business, among which may be mentioned the Lick case, the Montgomery Avenue case, the Dupont Street case, and the San Pablo Partition case. On account of this professional occupation, it was impossible for him to labor at the history continuously, and the thread of the work was constantly being interrupted—in some instances for months at a time. Almost all the labor, in fact, was performed at night, between the hours of 7 and 12 o'clock, with his wife and children sitting around and using the same table at which he wrote.

HON. GEORGE FLOURNOY, JR., who has signally distinguished the office of City and County Attorney of San Francisco, and who is yet one of the very youngest of my subjects, is a native of Texas, and is now (1889) about thirty-two years of age. He is the son of Col. George Flournoy, the noted advocate of the San Francisco bar, who long stood in the front rank of lawyers in the Lone Star State. The son was educated at Georgetown College, in the District of Columbia. He afterwards attended and graduated from the Law College at Richmond, Va. He began the practice of law in San Francisco, on his arrival from Texas in the year 1870. As a member of the prominent law firm of Flournoy, Mhoon & Flournoy, he soon justified the expectation of his father and his father's admirers. After about seven years' practice in this connection he received the unanimous nomination of the Democratic Convention for City and County Attorney of San Francisco, and was elected over Hon. John Lord Love, who was then the incumbent of the office, and who had been Attorney General of the State.

This, his first election, was in November, 1886. When his party convention was about to nominate for the office, the chairman of that body, Mr. I. Gutte, an influential and opulent merchant of the city, himself presented Mr. Flournoy's name. Mr. Russell J. Wilson, as a member of the bar, made a speech seconding the nomination, warmly testifying to his personal knowledge of Mr. Flournoy's sterling worth as a man, and of his eminent fitness for the place of counselor to the great city. Mr. Charles L. Ackerman followed on behalf of the bar, with these words :

Mr. Chairman and Gentlemen of the Convention: I feel I should be wanting in a courtesy which I owe to this convention, and above all, to my esteemed friend, young Flournoy, if I remained silent at this the supreme moment of his political life. Who is there who has ever sat under the magic spell of old Flournoy's voice? [Applause.] Who is there that has witnessed him in his efforts at the bar or in the forum, when with matchless eloquence he has soared with easy wing to the highest heaven of fancy, but must admit and feel that something of the overflowing genius of that grand old apostle of Democracy must be the true inheritance of his lineal descendant? Let a man be ever so adverse to learning, let him be indifferent to books, but let him be reared under so eloquent a tutor as old Flournoy, and he must become a man of varied scholarship. But independent of the associations of father and son, I feel that I can safely say in this presence, and to the bar of the city and to the people at large, that the same industry, the same inspiration, the same genius that has elevated Flournoy Sr., to proud eminence, where he now stands, will in but a short time place his son proudly by his side. [Applause.] We ask, therefore, this nomination of young Flournoy, not as a requital of the services his gifted father may have rendered, but because he himself possesses that ability which justly entitles him to that office. Nominate him, gentlemen, and if elected it will be but placing a wreath of honor upon the brow of merit.

Mr. Flournoy so conducted his important office that at the end of his first term of two years his party re-nominated him by acclamation, and he was again elected. Mr. Gutte was a member of the nominating convention,

and again presented his name with words of hearty commendation. I leave him in the office which his legal knowledge, his patience, energy and judgment have so signally adorned.

One of the most vigorous of the younger members of the San Francisco bar is Mr. JOSEPH ROTHSCHILD, who was born in that city in 1854. Mr. Rothschild attended the public schools of his native place, and afterward the State University. After graduating from the latter institution he entered Yale College, and pursued a two years' course of study in the law department thereof. He was presented by his classmates there with "the scales of justice," a prize given annually to the most popular student in the law class. After being admitted to practice by the Supreme Court of Connecticut he returned to San Francisco, and at once entered upon the active work of the profession. He enjoyed a large acquaintance, and his talents and energy of character found quick recognition. He is one of the few for whom important cases seem to be waiting, and from the inception of his professional career he has been one of our busiest practitioners.

In the sphere of the fraternal orders Mr. Rothschild has long been prominent, and has accomplished much useful work. Among the places he holds is that of President of the I. O. B. B., a body representative of the wealth and intellect of our Hebrew citizens, and whose jurisdiction covers the entire Pacific coast. It is a signal proof of merit that those who know him best place him first.

Mr. Rothschild has had a leading part in local and State politics, in which field he has also attracted attention as a forcible speaker. He was elected by the Democracy a member of the San Francisco Board of Education, and served the two years' term, 1887-88. Besides having an important chairmanship, he was the trusted legal adviser of the Board. He was one of the minority of well-known lawyers who urged upon the people the adoption of the new Constitution of 1879. As a speaker, among Mr. Rothschild's happiest efforts thus far are to be named his response to the toast of "The Press," before the Grand Lodge I. O. B. B., at Sacramento, January 30, 1885, and his response to the toast of "The Bar," at the memorable Democratic Banquet at San Francisco, May 20, 1884.

The father of Mr. Rothschild died in San Francisco in May, 1888, leaving a considerable estate.

CHAPTER XLIII.

John H. Boalt—A Graduate of Amherst—A Mining and Mechanical Engineer—At the Universities of Heidelberg and Freiburg—In the War of the Rebellion—Turns to the Law in Nevada—On the Bench—Removal to San Francisco—On the Great Blythe Case—Personal Notes—His Bohemian Good Bye to George T. Bromley.

The kind reader will please turn his eye now to the most conspicuous figure in the great array of counsel in the famous Blythe case—that is, the determined struggle that is progressing in San Francisco over the four million dollar estate of the late Thomas H. Blythe. In such commanding view is the brilliant and busy bar leader whose story makes this chapter—a man, too, of signal attainments, who has "still found leisure for letters and philosophy."

John Henry Boalt was born at Norwalk, Ohio, on the 29th day of March, 1837. After graduating at Amherst College, he concluded to make mining and mechanical engineering his profession, and with that end in view he went to Germany, and spent one year in study at Heidelberg, and two years at the famous mining school at Freiburg, at which so many of our leading mining experts and engineers graduated. After completing his course at these universities, he spent some months travelling in Europe preparatory to his return to the United States. Our great war breaking out, he at once returned, entered the army and was appointed lieutenant in Company D of the 11th Ohio cavalry. He was soon after transferred to the Signal Corps, and placed on the staff of General Curtis at Fort Leavenworth, where he served until the close of the war.

Nevada had now been admitted as a State; the great Comstock lode had been discovered, and was yielding its output of the precious metals in such richness and quantity as had never before been known in the annals of mining. Naturally the young man turned his attention to this Eldorado. He located at Austin, Nevada, then a thriving mining camp called the Reese River Mining District, newly discovered in Lander county, and supposed at that time to equal if not excel the famous Comstock lode at Virginia City. Everything was life, activity, and speculation. In 1865 he formed a partnership at Austin with Charles A. Stetefeldt in the mining and assaying business. It was during their partnership that the Stetefeldt Furnace Company was formed, for the purpose of reducing metalliferous ores. The process, in which he was one of the promoters and owners, was patented, and from its success he and his associates derived a large revenue.

But this was not the vocation in life that came naturally to him. He soon abandoned it for the broader field of the law. His intimate associates at this time were members of the bar, and Austin had a bar which would be eminent in any city. Men of great legal attainments had come from all parts of the country, allured by accounts of the fabulous wealth of this new mining region. With such associates it is not strange that he drifted into the legal profession. His instincts, too, all turned in that direction. He delighted in discussing legal propositions, and loved the law as a science. If there is anything in the theory of heredity, it is well exemplified in his case. He came of a long line of illustrious ancestors, on both sides of his house, eminent in the legal profession as well as in politics and public life. His father, Charles L. Boalt, was a lawyer of large practice and high reputation in northern Ohio. His mother was a daughter of Roger Griswold, a great jurist in his day, and Secretary of War under John Adams; his great-grandfather, Matthew Griswold, was governor of Connecticut, and president of the convention of that State which accepted the constitution of the United States; his great great grandfather, Roger Walcott, was governor of Connecticut, and father of Oliver Wolcott, a signer of the Declaration of Independence; his great uncle, Matthew Griswold, was Chief Justice of the State of Connecticut; and his uncle, Ebenezer Lane, was for a long period Chief Justice of the State of Ohio.

When the county of White Pine was formed out of Lander county, Judge Beatty, now Chief Justice of the Supreme Court of California, was Judge of the 6th Judicial District, Lander County, Nevada. He resigned to take the office of Judge of the new county of White Pine, and Judge Boalt was appointed to fill his unexpired term, upon the unanimous request of the bar of Austin. At the expiration of his term of office he moved to San Francisco. He has never since held, nor been an aspirant for, any office. While devoting his time, however, exclusively to his profession, he has always evinced an active interest in politics, and upon all the leading issues of the day he has taken a prominent place. With his pen and in public speeches he has contributed much to the formation of public sentiment. An article published by him in the *Overland Monthly* in November, 1888, on the silver question—a masterly and exhaustive treatise on that intricate political problem—has been largely quoted from by the leading statesmen of the day.

He read a paper on the Chinese question before the Berkeley club in August, 1877, in which he favored the exclusion of the Chinese race, as a policy necessary to the perpetuity of our form of government, and the advancement of our best interests. In this paper he showed conclusively that the Caucasian and Mongolian races are non-assimilating, and cannot live together harmoniously on the same soil unless one be in a state of servitude to the other. To him is largely due the agitation of the question of Chinese

immigration in the California legislature of 1877-78, which culminated in the passage of an act calling for a popular vote to test the views of the people of the State of California on the Chinese question. Hon. Creed Haymond, then in the State Senate, proposed the act and referred to this paper of Judge Boalt's as its source.

In his profession his education as a mining expert has stood him in good stead. In the great case of the Holmes Mining Company against the Northern Belle Mill and Mining Company, tried in the United States Circuit Court at Carson, Nevada, in which he was one of the leading counsel for the Holmes company, this was strikingly exemplified in the cross-examination of the expert witnesses of the opposing side. So successful was his advocacy in that case that his clients are now the owners of the whole of the Northern Belle Mining ground. He was leading counsel in the case of the United States against the Sierra Lumber Company, in which the defendants were charged with trespass for cutting timber on government land to an amount exceeding two millions of dollars in value. Although the plaintiff got a judgment, the amount was reduced to less than forty thousand dollars—really a great victory for the defendants.

Judge Boalt first came to San Francisco in 1871, and soon thereafter the law partnership of Estee & Boalt was formed, which continued in existence until 1879, when it was dissolved by mutual consent. Judge Boalt then retired for a time from practice, and with his family went to Europe, where he spent about two years in travel. Returning to San Francisco he opened an office alone. He at once entered into a large, lucrative, and varied practice, among his clients being some of the leading men of California, engaged in mining and other large industries. He also devoted much of his time to the law of patents, in which branch of practice he has achieved an enviable reputation.

While Judge Boalt is technical as a lawyer, his views are broad, and in all questions of legal intricacy his attention is given to the gist of the matter rather than to its form.

On the 1st of April, 1889, Judge Boalt formed a partnership with Hon. John Garber and Thomas B. Bishop. The firm of Garber, Boalt, & Bishop is in the estimation of some sound judges the strongest on the Pacific coast. Judge Boalt's argument lately delivered in the Superior Court of San Francisco for plaintiff on the demurrer of defendant, in the case of Spring Valley Water Works against the city and county of San Francisco, a case which has absorbed much of the public attention on account of its importance to the tax-payers of the city, is a masterly effort—one of the best products of his mind.

Judge Boalt is a man of fine presence, genial in disposition and universally beloved by his intimate associates. He is a great favorite with the bar,

especially with the younger members. He is a leading light in both the Bohemian and Union clubs. "The Owl Biddith Good-bye to Bromley"—delivered by him before the Bohemian club on the departure of George T. Bromley, the philosopher-wit on his mission as a United States Consul in Northern China, is a delightful combination of wit and wisdom. It is now reproduced in full. Judge Boalt's friends agree that the "Owl" might truly address the judge himself in kindred strain.

THUS SAITH THE OWL!

All hail, Bromley!

All hail, Arch High-Priest of our realm of Bohemia!

All hail, Grand Too-Whit of the noble order of the Ulula!

Thou hast found favor in my yellow eyes!

Thou hast gained lodgment in this ancient heart!

I have not dimmed my love by expressing it in words—I would not waste my love in words!

Nor have I shown it by my smiles; I do not smile on those I love.

But thou hast not mistaken me!

At thy approach my closed eyelids, weary with the fullness of surrounding emptiness, have opened wide. At sight of thee the eager pupils of mine eyes have dilated till they were like to burst their broad circumference. In thy presence my protruded bosom hath expanded until each yearning feather stood on end.

Between thee and me neither word nor smile was needed.

Thou camest! I poured upon thee the refreshing flood of an approving and affectionate silence.

For years I have marked thee in thy daily walk; a kindly heart to whom all hearts must needs be kind; a cheerful spirit, quick to enjoy the sunshine, and to find it even among clouds; a genial soul, receiving the young with pleasant welcome and retaining the old, because the pleasant welcome hath grown into a permanent friendship.

And I have noted in thee that higher wisdom which is wise enough sometimes to stoop to folly. Thou art too wise to be forever wise!

True wisdom hath no grief! Look at me. I weep not! But the wisdom of men is sad and full of pain; it maketh the heart sick and the eyelids heavy. Therefore, is such wisdom in so far unwise, for grief and death are sworn allies!

Whatever else be folly, it is surely wise to be merry, and if much wisdom banish merriment, then is such wisdom a false friend.

Where now are the wise men of the ancient days?

I and mine hold merry feasts in their nameless tombs.

What they thought wisdom is now sport for children; what they deemed solemn worship is now idle mummery.

So in the never-ending cycles to come shall the jest of to-day become earnest, and the earnest become jest and the one be mistaken for the other.

Therefore, have I looked on with pleasure when thou hast led the revels of my Bohemian children. Thy unctious voice hath always inspired their mirth; thy jovial face hath ever inflamed their laughter.

I have seen thee, as High-Priest, guiding the young neophyte to the Bohemian altar, and leading his soul upward with such uttered precept as never neophyte heard before. I have listened when with strenuous voice thou hast brought in hoarse carols from the briny deep.

Often, for very sport thou wouldst load up most grave and serious words with light and unaccustomed freight of meaning, and then, anon, wouldst dress some solemn thought in such gay, frivolous garb of language, that men mistook it for a wanton. Many the quips and jests which I have heard from thee, but I have noted that there was never malice behind thy humor, and never sting to mar the honey of thy wit. And now, O best beloved of the Owl; the time draws near when we must part. I break the silence of unnumbered years to say, "Farewell!" But we shall meet again. Not soon, perhaps, within these halls, nor in the busy hours of day. But in the quiet of the night, when sleep hath come, I and many a friend of former days shall visit thee in thy distant home and bless thy dreams!"

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CHAPTER XLIV.

E. D. Wheeler—Another of Our Pioneers—Early Life—Studying under Don Morrison in Illinois—Mining at Placerville—In Trade at Sacramento—County Clerk of Yuba—Incident of His Examination for the Bar—In the State Senate—On the Bench in San Francisco—Observations of Henry E. Highton—A Patriotic Pleasantry.

The bar leader and jurist who now attracts us has been the subject of repeated and delightful reference in this volume. Looking backward over the long line of argonauts, few names stand out more prominently than his in law and politics. Coming to California in 1849 he has resided here continually, holding high place in the legal world, and a warm corner in the hearts of the people.

E. D. Wheeler was born on the 8th of January, 1828, in Roxbury, Litchfield County, Connecticut, and was one of ten children. His parents were of English descent on his mother's side, and Welsh on his father's. In 1832 his family moved to Cayuga County in New York, and there his boyhood days were passed. He mastered the branches of learning there taught in what were called the common schools of New York, and at fifteen entered the Academy at Jordan, Onondaga County, New York, where he pursued his studies for two years. He intended to take a collegiate course, but just at a time when the avenues of learning were broadening and widening, his family moved to the then far West, and settled in Rock County, Wisconsin. Here the rough life of the frontier, and absence of advanced schools closed his career as far as any institution of learning was concerned. He went to work with a will, helping to clear the home farm. About this time his father met with an accident and died, leaving a widow and nine children. Mr. Wheeler being next to the eldest had the burdens of manhood thrown upon him at an early age. He was equal to the responsibility, putting aside all thoughts of self and abandoning for a time his ambition. He worked steadily in the interest of his family, and when the cold winter closed in and prevented outside labor, he taught school.

When only nineteen years of age, and having no legal knowledge he was always employed in all the Justices Court cases in the township where he resided; this because of his ability as a debater, as displayed in the societies then much in fashion.

In the spring of 1847, having surrendered his interests in the home place, he departed and settled in Belleville, Illinois, fourteen miles east of St. Louis. Here he passed two years of his life that gave direction to his future. At that time Belleville possessed an able and brilliant bar, and Mr. Wheeler

was thrown into daily contact with pushing, energetic, capable men. Lyman Trumbull, since United States Senator and now a venerable bar leader of Chicago, was the principal attorney in Belleville. Don Morrison, a brother of our late Chief Justice, was also a distinguished man there at that time. Mr. Wheeler pursued his legal studies in the office of Mr. Morrison. He worked early and late, it being his intention to become a member of the bar and settle in Saint Clair County.

But the California gold fever had reached that section, and prompted by the spirit of adventure that animated thousands of progressive young men of that time, Mr. Wheeler closed his law books, gave up his school, and joining a small train in April, 1849, started across the plains from St. Louis, Missouri. On August 26th, Placerville, then called Hangtown, was reached. Mr. Wheeler engaged in mining in that vicinity. Not long afterwards he went to Sacramento and followed merchandizing and steamboat freighting for a while.

It was in February, 1850, that Mr. Wheeler settled in Marysville, then known as Nye Ranch, and one of the most flourishing of the northern towns, where he was destined to establish his great reputation as a lawyer. As an illustration of the go-ahead way of those days, he, after a two months residence there, ran for the office of County Clerk of Yuba County, which county then embraced the present counties of Yuba, Nevada and Sierra. He was elected by a handsome majority. He held the office for two years, doing most of his own work, and diligently pursuing his law studies at night and in spare hours. On April 15th, 1852, he went before the Supreme Court then sitting at San Francisco, and stood his examination. His close reading and courtroom experience while County Clerk, and his former studies in Illinois, had well qualified him, and he passed with high honor. The committee consisted of M. H. McAllister, afterwards United States Circuit Judge, and father of the distinguished Hall McAllister, Jas. A. McDougall, afterwards United States Senator, and Edward Norton, subsequently on the Supreme bench of this State. Mr. McAllister conducted the examination, a little incident of which is illustrative of Mr. Wheeler's ready wit. The questions put by Mr. McAllister had been chiefly on the common law. These were readily answered. Then Mr. McAllister asked, "If a man die intestate what becomes of his property."

To answer this correctly involved a familiarity with the statute of descents and distributions. Not being as ready with an answer as possibly he should have been he was forced to rely upon his wits to help him out; so he replied, "I don't know how it would be in San Francisco, but in Yuba County where I live, the property in such cases is divided between the public administrator and the physician who attended the deceased in his last illness."

Mr. McAllister laughed heartily and remarked that he was perfectly

satisfied that if the applicant was not a good lawyer then he soon would be, and the committee reported favorably on the examination and Mr. Wheeler was sworn in.

After a visit to the Eastern States occupying some eight or nine months, during which he traveled extensively through the north and south, Mr. Wheeler returned to California and in January, 1853, opened a law office in Marysville and entered actively into the practice of his profession. His business grew rapidly and he took a leading position at a bar of brainy men. He studied closely, was attentive and industrious. He amassed a comfortable fortune in a few years. During his residence in Marysville, from 1853 until 1860, he was employed in some of the leading cases in the northern part of the State. For a time he was a member of the Marysville City Council and filled the office of public administrator, which last place he shortly resigned in order to give his entire time to legal business of his own.

In 1858 Mr. Wheeler was nominated for the State Senate by the Democratic party of Yuba County. At that time occurred the split in the Democratic ranks over the great question of freedom or slavery in the territories, following close upon the disruption in Washington between Douglas and Buchanan. Mr. Wheeler took the side of Douglas. The Lecompton or Buchanan wing bolted his nomination, and put up a pro-slavery Democrat to oppose him. The contest was bitter and spirited. Mr. Wheeler took the stump and made many speeches. These were forcible and eloquent efforts and established him as an orator. They made him many friends outside of his own party. He was elected by a handsome majority. In the senate he served for two sessions, and became a leader in debate from the first. He was logical, and eloquent, quick, accurate, and ready. His wide reading, literary taste and knowledge, made him a dangerous opponent, and his keen sarcasm and wit enlivened the tedium of many a long debate. His first great speech in that body was on the occasion of what was probably the most exciting and acrimonious debate of those stirring times. This arose on the resolution offered by Senator William Holden (afterwards Lieutenant-Governor) requesting the resignation of Hon. David C. Broderick, then United States Senator, because Broderick in his capacity as Senator had voted against the admission of Kansas with a pro-slavery constitution.

This great debate but presaged the more serious contest that soon was to follow upon the great slavery question. Mr. Wheeler defended Broderick's course in one of the ablest speeches in the history of our State Senate. It made him distinguished as a popular leader and an orator.

After his term in the Senate closed, Mr. Wheeler removed to San Francisco. This was in 1860. His first business partnership in that city was with Hon. O. C. Pratt. His firm enjoyed a lucrative practice from the first; however, the association did not long continue. For the next twelve years

Mr. Wheeler followed the practice in San Francisco with the exception of six months' residence in White Pine, Nevada, whither he was lured by the mining excitement that drew so many lawyers from California. On his return from Nevada he resumed business in San Francisco and has resided there ever since.

The 19th Judicial District Court was organized in 1872, and on March 8th of that year Governor Newton Booth appointed Mr. Wheeler as the Judge of the new tribunal. Immediately on his qualifying, Judge Wheeler's court was crowded with business. Before him were tried some of the most important cases in the State.

Notable among these cases was that of the Rev. T. Madison Dawson against Rev. Dr. W. A. Scott and others, the defendants representing the Presbyterian church. This case is noticed at some length in the chapter on Mr. Highton in this volume, at pages 179-180. I beg to call attention to it again. "The discussion in this case," as Mr. Highton once observed in a conversation I had with him, "was historical as well as legal, and, escaping from dry technicalities, went down deep into the structure of our Government itself. The opinion of Judge Wheeler in favor of the plaintiff was in truth a remarkable specimen of judicial reasoning, and both in manner and in method fully reached the height of the litigation in which it was delivered. No appeal was taken, but whether approved or disapproved, it will stand in the records of this State as the result of great thought and labor, and as pursuing a line of argument couched in language at once forcible and elegant; and it ranks among the prominent contributions of the law by the judiciary of the country."

Mr. Highton continued, "I can say that while Judge Wheeler was on the bench he tried many important cases in some of which I myself participated on one side or the other, and his decisions were usually maintained by the Supreme Court. He was most prominent and most successful in the administration of equity. His mind seemed intuitively to grasp those settled principles through which equity relieves the unsubstantial technicalities of the law, and succeeds, to some extent at least, in applying and enforcing natural justice. I have no hesitation in saying that in my opinion he was the best Chancellor who ever sat on the bench in this State."

In the fall of 1873, Judge Wheeler was nominated for the bench which he then held, by the Republican and People's parties. He was elected for a full term of six years, his Democratic opponent being Hon. Wm. P. Dangerfield. He remained on the bench of the 19th District Court until that tribunal, with all the District Courts, passed out of existence with the adoption of the new constitution of 1879. In the latter year he was one of the Republican nominees for Justices of the Supreme Court, but was defeated, with all his judicial ticket except one, by the combined Democratic and

Kearney vote—which vote had been unable to unite against the single Republican elected.

Since his retirement from the bench in January, 1880, Judge Wheeler has been in active practice in San Francisco. While not large, his business has been lucrative and he has been in many important cases. Among them being the great trade mark whiskey case of *Moorman vs. Henarie, et al*, in the United States Circuit Court. In the celebrated divorce case of *White vs. White*, involving over a million of dollars, tried before Judge T. K. Wilson, of the Superior Court in San Francisco, Judge Wheeler made one of the most eloquent and exhaustive arguments in the history of our State. At present he is engaged in the great case of the Blythe estate, involving several millions of dollars and destined to be one of the most celebrated in our judicial annals.

On November 14th, 1854, Judge Wheeler was married in Marysville, his wife being Miss Julia A. Rowe, eldest daughter of Gen. Geo. Rowe, one of the leading lawyers in the northern part of the State. His wife and two sons constitute his family. Both the sons adopted the profession of the law; one being quite a prominent young attorney of Eureka in this State. The elder son abandoned the practice and is engaged in the insurance business in San Francisco.

Washington's birthday, of the Centennial year, fell upon Tuesday. The Nineteenth District Court was in session on Monday, and shortly after it was opened there being many lawyers present, among them several bar leaders, it was agreed among them that Hon. John W. Dwinelle should move the court to adjourn until Wednesday, as a mark of respect to the memory of Freedom's child and champion—

"Such as Columbia saw arise when she
Sprang forth a Pallas, armed and undefiled."

The motion which Mr. Dwinelle was appointed to make was not a necessary one to effect a due observance of Washington's birthday, for, under the codes which had gone into effect three years before, the day had been a legal holiday, and regularly observed as such, the courts all adjourning. But it was proposed to have a special bar holiday.

When Mr. Dwinelle had proceeded a few minutes, the court—Judge E. D. Wheeler—took in the situation, and entered into the patriotic spirit of the occasion.

Mr. Dwinelle said: "May it please the court: It becomes my duty, assigned to me by the members of the bar now present, to announce to your honor the death of George Washington, which took place at his residence at Mount Vernon, in the State of Virginia, in the sixty-seventh year of his age, and in the year of our Lord, 1799."

Mr. Dwinelle then made a happy *in memoriam* address, in which he ventured to facetiously observe that it was the misfortune of General Washington that he was not a lawyer. He said: "That element was wanting to complete the perfect sphere of his greatness."

Mr. Dwinelle having concluded with a motion to adjourn, Governor Haight (may he rest in peace) arose and said:

"I would take pleasure in seconding the motion; but I think that, inasmuch as I had not the pleasure of a personal acquaintance with the deceased, I had better leave it to General Nourse or Judge Cowles."

Gen. Nourse is now in large practice at Fresno.

Both of the alleged intimates of General Washington being unable to arise under the weight of years, Judge Wheeler promptly responded:

"Gentlemen, this motion certainly awakens a great many historical recollections in the mind of the Court, perhaps nothing more pointed than the celebrated speech of Mr. Hayne, to which Mr. Webster replied, but not just then. At the conclusion of Mr. Hayne's speech an adjournment was moved by a very distinguished member of the Senate, on the ground that the universal good feeling that had been created by the eloquent South Carolinian might be somewhat marred by the transaction of any further business on that day, and the adjournment was, I believe, unanimously carried.

"I doubt very much if a scene so similar to that has ever been enacted since until now. And feeling imbued with the spirit that pervaded the United States Senate on that occasion, I think the motion now made should be unanimously concurred in and granted.

"It would have been, no doubt, a great pleasure to George Washington to have looked down the distant future seventy-five or a hundred years, and listen to the eulogy that has been pronounced upon him this morning, in a court then unborn, in a State then unorganized. The facts of history seem to justify us in presuming that these things were all foreordained; and that they have been, on this occasion, most felicitously executed, is beyond doubt. I can do nothing better than adjourn the court for the reasons stated in support of the motion."

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